Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 8, 2001

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QUESTION PRESENTED

This Court has granted petitions for certiorari to review the Eighth Circuit's decision in *Iowa Utilities Board* v. *FCC*, 219 F.3d 744 (8th Cir. 2000), that it violated the plain terms of 47 U.S.C. § 252(d)(1) for the FCC to adopt the TELRIC cost methodology to determine the rate terms of interconnection agreements. *Verizon Communications Inc.* v. *FCC*, 531 U.S. __ (Jan. 22, 2001) (No. 00-511) (order list).* In the decision below, the Eighth Circuit applied its earlier decision to invalidate an interconnection agreement that was based on TELRIC. This case should be held pending the Court's decision in *Verizon Communications*, for this case, too, presents the question:

Whether the court of appeals erred in holding that 47 U.S.C. § 252(d)(1) forecloses the cost methodology adopted by the FCC, which is based on the efficient replacement cost of existing technology, for determining the interconnection rates that new entrants into local telecommunications markets must pay incumbent local telephone companies?

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* The Court granted petitions for certiorari in five related cases, which have since been consolidated: *Verizon Communications Inc.* v. *FCC*; *WorldCom Inc.* v. *Verizon Communications Inc.*; *FCC* v. *Iowa Utilities Board*; *AT&T Corp.* v. *Iowa Utilities Board*; *General Communications Inc.* v. *Iowa Utilities Board*, 531 U.S. __ (Jan. 22, 2001) (Nos. 00-511, 00-555, 00-587, 00-590, 00-602) (order list). They are referred to herein as "*Verizon Communications*."

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the following parties, who were appellees below and who supported AT&T's position, are nominal respondents in this proceeding:

Missouri Public Service Commission,
Sheila A. Lumpe,
M. Dianne Drainer,
Harold Crumpton,
Robert Schemenauer, and
Connie Murray.

All parties to the proceedings below are listed in the caption of the Eighth Circuit's opinion in this case. See Petitioner's Appendix 1a. Pursuant to Sup. Ct. R. 29.6, Petitioner AT&T Communications of the Southwest, Inc. declares that it is a wholly-owned subsidiary of AT&T Corp.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on January 8, 2001, is reported at 236 F.3d 922, and is reproduced in the Appendix (App.) at 1a-10a. The Order of the United States District Court for the Western District of Missouri affirming in part and remanding in part orders of the Missouri Public Service Commission was issued on August 31, 1999, is reported at 86 F. Supp. 2d 932, and is reproduced at App. 11a-69a. The relevant orders of the Missouri Public Service Commission were issued on March 19, 1998 and July 31, 1997, are not reported, and are reproduced at App. 70a-94a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 8, 2001, and the petition for panel rehearing was denied on February 7, 2001, App. 95a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, and the relevant administrative regulation, 47 C.F.R. § 51.505, are reproduced at App. 96a-116a.

STATEMENT OF THE CASE

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act"), Congress enacted new provisions of the Communications Act that sought to promote local telephone competition by giving new entrants a right to lease elements of the incumbent local exchange carrier ("LEC") monopolists' networks at rates that are based on the cost of providing the elements. 47 U.S.C. §§ 251(c)(3) & 252(d)(1). To implement this requirement, the Federal Communications Commission ("FCC") adopted regulations that required that these rates be set under a long run incremental cost standard called "TELRIC." It requires that costs be "measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." 47 C.F.R. § 51.505(b)(1). The Eighth Circuit initially vacated this regulation on the ground that the FCC lacked jurisdiction to adopt it, but this Court reversed that decision. *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 384-85 (1999).

On remand, the Eighth Circuit held that the FCC's TELRIC regulation violated the plain terms of 47 U.S.C.

§ 252(d)(1)(A)(i) insofar as the regulation requires that costs be determined based on the most efficient technology and network design. *Iowa Utils. Bd.* v. *FCC*, 219 F.3d 744, 749-51 (8th Cir. 2000) ("*Iowa Utilities II*"). The Eighth Circuit stayed this holding pending the disposition of petitions for writ of certiorari in this Court. On January 22, 2001, this Court granted petitions for writ of certiorari to review the Eighth Circuit's decision, on the question, *inter alia*:

> Whether the court of appeals erred in holding that 47 U.S.C. § 252(d)(1) (Telecommunications Act of 1996) forecloses the cost methodology adopted by the FCC, which is based on the efficient replacement cost of existing technology, for determining the interconnection rates that new entrants into local telecommunications markets must pay incumbent local telephone companies.

Verizon Communications, 531 U.S. __ (Jan. 22, 2001) (Nos. 00-511, 00-555, 00-587, 00-590, 00-602) (order list).

Before this Court granted certiorari, the Eighth Circuit applied its second *Iowa Utilities* decision to invalidate an interconnection agreement entered into by Southwestern Bell Telephone Co. ("SWBT") and AT&T that had been arbitrated and approved by the Missouri Public Service Commission ("PSC"). AT&T had previously sought access to SWBT's network to provide local telephone service in Missouri. When the statutorily-required negotiations failed to produce agreement,[1] AT&T sought arbitration before the Missouri PSC. 47 U.S.C. § 252(b). On December 11, 1996, the PSC entered an order setting interim rates under TELRIC. App.

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[1] 47 U.S.C. § 252(a)(1) provides that the competitor and the incumbent LEC "may negotiate and enter into a binding agreement ... without regard" to certain of the obligations imposed by the Act. However, "if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder." *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366, 373 (1999).

16a. On July 31, 1997, the PSC issued its Final Arbitration Order, adopting permanent rates under the TELRIC methodology. *Id.* at 16a-17a. On October 10, 1997, the parties entered their first interconnection agreement consistent with the PSC's orders. The agreement was approved by the PSC on November 5, 1997. Because there remained unresolved pricing issues, the parties entered into a second arbitration. On March 4, 1998, the parties filed their agreement, which was approved on March 19, 1998.

SWBT sought review of the arbitration agreement in the Western District of Missouri, claiming, *inter alia*, that the pricing methodology used by the PSC violates the 1996 Act, and that the procedures followed in the arbitration violated due process. App. 29a. The district court affirmed in part and reversed and remanded in part. *Id.* at 69a. On appeal, the Eighth Circuit concluded that because the § 252 agreement adopted prices based on TELRIC, because it had previously held TELRIC to be unlawful, and because the prices were not severable from the rest of the agreement, "the holding in *Iowa Utilities II* invalidating the TELRIC pricing methodology requires that the entire arbitrated agreement approved by the PSC in this case be vacated and that further proceedings (assuming AT & T still wants access to SWBT's network in Missouri) be held." *Id.* at 5a. The court further instructed that "[a]ny such proceedings should employ a pricing methodology that is consistent with the 1996 Act as interpreted by this Court." *Id.* Because the original proceedings were now "of no consequence," the court "decline[d] to address the constitutional due process arguments raised by SWBT." *Id.* at 6a.

Upon the unopposed motion of AT&T, the Eighth Circuit granted a stay of its mandate pending decision of this Court in *Iowa Utilities II*. See App. 95a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision below is fully controlled by its earlier decision in *Iowa Utilities II*, and its validity will be determined by this Court's decision in *Verizon Communications*. The Eighth Circuit was explicit that its decision in the instant case was squarely governed by the earlier case: "the holding in *Iowa Utilities II* invalidating the TELRIC pricing methodology requires that the entire arbitrated agreement approved by the PSC in this case be vacated." See App. 5a.

Unless this Court affirms the Eighth Circuit's decision invalidating § 51.505(b)(1) in its entirety, vacatur of the decision in this case will be appropriate and necessary to allow the Eighth Circuit to reconsider its decision in light of this Court's opinion. Accordingly, Petitioner requests that this Court hold this petition pending this Court's resolution of *Iowa Utilities II*, and if appropriate in light of the disposition of that case, grant the petition for writ of certiorari, vacate the lower court's decision and remand to the Eighth Circuit for further proceedings.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be held pending this Court's disposition of *Iowa Utilities II*.

Respectfully submitted,

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May 8, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

Nos. 99-3833, 99-3908.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION; SHEILA A. LUMPE; M. DIANNE DRAINER, Vice-Chair; HAROLD CRUMPTON, Commissioner; ROBERT SCHEMENAUER, Commissioner; CONNIE MURRAY, Commissioner, all the above parties in their official capacities as commissioners of the Missouri Public Service Commission; AT & T COMMUNICATIONS OF THE SOUTHWEST, INC.,

Appellees.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION; SHEILA A. LUMPE; M. DIANNE DRAINER, Vice-Chair; HAROLD CRUMPTON, Commissioner; CONNIE MURRAY, Commissioner, all the above parties in their official capacities as commissioners of the Missouri Public Service Commission; AT & T COMMUNICATIONS OF THE SOUTHWEST, INC.,

Appellees.

Submitted: May 8, 2000
Filed: Jan. 8, 2001

Before RICHARD S. ARNOLD and BOWMAN, Circuit Judges, and MAGNUSON,[1] District Judge.

BOWMAN, Circuit Judge.

Southwestern Bell Telephone Co. (SWBT) appeals from the order of the District Court affirming in part and remanding in part orders of the Missouri Public Service Commission (PSC). In light of recent developments in the law, we remand to the District Court with instructions.

I.

This case arises under the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.),[2] which was enacted to increase competition in the provision of telecommunications services. Under the Act, an incumbent local exchange carrier (LEC)[3] is obligated "to share its network with competitors." *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999) (citing 47 U.S.C. § 251(c) (Supp. II 1994)). The prospective competitor and the incumbent LEC "may negotiate and enter into a binding agreement . . . without regard to the" obligations imposed by certain sections of the Act. 47 U.S.C. § 252(a)(1). For example, the parties may agree to rates or terms that would not otherwise comply with the law or be required under the Act, as long as the state

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[1] The Honorable Paul A. Magnuson, Chief Judge, United States District Court for the District of Minnesota, sitting by designation.

[2] Unless otherwise indicated, all references in this opinion to sections and subsections of the Telecommunications Act of 1996 are to Supp. IV (1998) of the United States Code. All references to the Code of Federal Regulations (C.F.R.) are to the most recent available version, the 1999 edition.

[3] LECs provide local telephone service or offer local access for long-distance service. 47 U.S.C. § 153(16), (26), (47). Incumbent LECs are those that were providing local phone service to an area on the effective date of the Act. *Id.* § 251(h)(1).

commission ultimately approves. "But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to § 251 and the FCC regulations promulgated thereunder." *AT & T Corp.*, 525 U.S. at 373, 119 S.Ct. 721.

Here, AT & T sought access to incumbent LEC SWBT's network for the purpose of providing local telephone service in Missouri, and the parties entered into negotiations. Unable to reach agreement on all of the terms and conditions, AT & T sought PSC arbitration as provided for in 47 U.S.C. § 252(b). There were two arbitrations, the second of which was preceded by a mediation conducted by the PSC's general counsel acting as a special master. The PSC approved a final agreement on March 19, 1998.

SWBT sought review in the District Court. *See* 47 U.S.C. § 252(e)(6) (conferring federal court jurisdiction for aggrieved party to challenge state commission determination as violation of Act). The court affirmed in part and reversed and remanded in part. *AT&T Communications of Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F.Supp.2d 932 (W.D.Mo.1999) (consolidated cases). SWBT appeals to this Court, challenging (1) the process employed by the PSC, (2) two of the PSC's pricing decisions, and (3) a PSC decision regarding combined network elements. We address the pricing decisions first.

II.

After the passage of the Telecommunications Act of 1996, the Federal Communications Commission (FCC), as charged by Congress in the Act, promulgated rules to implement the part of the Act at issue in this case. *See In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499 (1996) (First Report and Order). The PSC's pricing decision that is

challenged here was made by reference to the FCC's chosen method of cost-based pricing. The FCC's method is known by its acronym, TELRIC, which stands for total element long run incremental cost. TELRIC provides a basis for determining the prices that will be charged for the interconnection and network elements that incumbent LECs are required to make available to potential competitors. In its First Report and Order, the FCC adopted TELRIC as a "forward-looking, cost-based pricing standard." *Id.* at 15844, ¶ 673. As described in 47 C.F.R. § 51.505(b)(1), the FCC determined that the TELRIC of an element (and therefore the price an incumbent LEC may charge a potential competitor for that element) "should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." After reviewing a direct challenge to § 51.505(b)(1), however, this Court recently vacated the FCC's pricing methodology:

> At bottom . . ., Congress has made it clear that it is the cost of providing the actual facilities and equipment that will be used by the competitor (and not some state of the art presently available technology ideally configured but neither deployed by the ILEC nor to be used by the competitor) which must be ascertained and determined.

Iowa Utils. Bd. v. FCC, 219 F.3d 744, 751 (8th Cir.2000) (*Iowa Utils. II*).[4]

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[4] Legal challenges to the rules promulgated in the FCC's First Report and Order, and they are legion, have been consolidated in the Eighth Circuit. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 792 (8th Cir.1997) (*Iowa Utils. I*). Our decision last summer in *Iowa Utilities II* resulted from the Supreme Court's remand of our decision in *Iowa Utilities I*. *See AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). The Supreme Court in *AT & T Corp.* specifically noted that it was not addressing the TELRIC methodology question (subsequently decided by the Eighth Circuit in *Iowa Utilities II*). *Id.* at 374 n. 3, 119 S.Ct. 721.

Here, it is clear that price—the amount that may be charged for the network access AT & T seeks from SWBT—is the overarching focus of the § 252 agreement between the parties, and we do not believe that the pricing decisions therein are severable from the rest of the agreement. We therefore conclude that the holding in *Iowa Utilities II* invalidating the TELRIC pricing methodology requires that the entire arbitrated agreement approved by the PSC in this case be vacated and that further proceedings (assuming AT & T still wants access to SWBT's network in Missouri) be held. Any such proceedings should employ a pricing methodology that is consistent with the 1996 Act as interpreted by this Court.

SWBT further argues that, "[e]ven if it were permissible to set prices based on the forward-looking costs of an idealized network, the PSC arbitrarily reduced Southwestern Bell's NRCs [nonrecurring costs] for unbundled network elements to a level below even those contemplated by a super-efficient hypothetical network." Br. of Appellant at 56. Because we hold, in keeping with this Court's decision in *Iowa Utilities II*, that it was not permissible for the PSC "to set prices based on the forward-looking costs of an idealized network," and because we are remanding for further proceedings that will involve new calculations, we do not address the nonrecurring costs issue SWBT raises.

We also should note that, after the opinion in *Iowa Utilities II* was filed on July 18, 2000, the panel granted the FCC's motion to stay the mandate on that part of the decision that vacated 47 C.F. R. [sic] § 51.505(b)(1), pending the filing and disposition of petitions for writ of certiorari in the Supreme Court. In October 2000, a number of such petitions were filed, and as this opinion is written those petitions remain pending in the Supreme Court. Notwithstanding this turn of events, our decision in *Iowa Utilities II* is not vacated, remains the law, and requires vacatur of the § 252 agreement reached in this case.

III.

Given that this case was not the proper vehicle for a collateral challenge to the FCC's rulemaking (that is, to the TELRIC methodology per se), but instead presented only a challenge to the PSC's application of FCC rules to the facts of the case, the TELRIC pricing issue on which we decide the case merited only fleeting mention in the briefs, and appropriately so. The bulk of SWBT's argument for remand was dedicated to challenging the process afforded SWBT (and AT & T, for that matter) during the proceedings before the PSC. As we have said, the pricing methodology employed by the PSC in this case pursuant to rules promulgated by the FCC is not valid under the Act, and thus the § 252 agreement must be vacated. On remand, negotiations between the parties, and PSC arbitration as necessary, will begin anew, and so the process afforded SWBT in the initial PSC proceeding is now of no consequence. Accordingly, we decline to address the constitutional due process arguments raised by SWBT. Without deciding the question, however, we nevertheless note that there appear to be at least potential due process problems inherent in the procedure employed by the PSC.[5] In any future § 252 arbitrations that become necessary in this case, or in any other such case that may come before the PSC, we caution the PSC to be more circumspect in the process it employs, with particular attention to excessive reliance on staff reports, especially those reports compiled after unnecessary ex parte discussions with parties. If the PSC fails to do so, the next aggrieved party to appear in federal

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[5] The District Court found that SWBT was not prejudiced by the alleged irregularities (which are fully set forth in that court's opinion) and therefore declined to invalidate the PSC proceedings and the results of those proceedings. *AT & T Communications*, 86 F.Supp.2d at 951-55. The court also concluded that the PSC procedures were neither arbitrary and capricious, nor in violation of any state statutes or regulations that might be applicable to state commission arbitrations held pursuant to 47 U.S.C. § 252. *Id.* at 955-58.

court on a matter such as this may well be able to demonstrate that the procedures employed (which, incidently, were vehemently objected to by AT & T as well as SWBT at the time of the arbitrations) either were inherently lacking in due process or resulted in prejudice to the aggrieved party, requiring vacatur of the results of the proceedings.

IV.

Finally, SWBT complains that its agreement with a particular negotiated provision, an agreement made only to comply with an FCC rule later determined to be invalid under the Act, did not constitute a waiver of its right to challenge the negotiated provision in federal court. Both the PSC and the District Court determined that the agreement was voluntary and enforceable.

In *Iowa Utilities I*, this Court vacated 47 C.F.R. § 51.315(c)-(f). 120 F.3d at 813. Those subsections required incumbent LECs to combine network elements as requested by a potential competitor and as technically feasible "in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network." 47 C.F.R. § 51.315(c). The Supreme Court in *AT & T Corp.* did not disturb our holding that the rules must be vacated, and we reaffirmed our conclusion in *Iowa Utilities II*. 219 F.3d at 759 ("We are convinced that rules 51.315(c)-(f) must remain vacated.").

Our opinion in *Iowa Utilities I* was filed on July 18, 1997, at which time all were on notice that the combination rules of 47 C.F.R. § 51.315(c)-(f) were contrary to the Act. By the end of the month, the PSC issued its final arbitration order in this case.[6] On August 20, 1997, SWBT filed a Motion for

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[6] According to SWBT, the determination that SWBT would combine network elements for AT & T was resolved in the voluntary negotiations that took place before arbitration. Br. of Appellant at 61 ("The negotiations preceding the arbitration were conducted under the FCC mandate to combine elements, and the only matters presented for

Clarification, Modification and Application for Rehearing of Final Arbitration Order. That motion cited *Iowa Utilities I*, but not in reference to the vacatur of § 51.315(c)-(f). On October 10, 1997, nearly two months later, the parties filed an interconnection agreement (we use the term loosely, as such agreement incorporated the PSC's arbitration orders) for PSC approval. According to the terms of the agreement, SWBT was to provide combinations of network elements as requested by AT & T whether or not such elements were combined in SWBT's existing network, notwithstanding that this Court had invalidated the FCC's rules so requiring almost three months earlier. SWBT filed a Notice of Clarification Concerning Pending Interconnection Agreement on October 30, 1997, and for the first time advised the PSC of the *Iowa Utilities I* decision regarding the rules set forth in § 51.315(c)-(f). The PSC approved the October 10 interconnection agreement on November 5, 1997, and later rejected the § 51.315(c)-(f) argument presented in SWBT's Notice of Clarification. The District Court, in its review, concluded that SWBT voluntarily agreed to combine unbundled elements *after* we had vacated the FCC's rules requiring incumbent LECs to do so and therefore the PSC "properly required SWBT to abide by its contractual agreement." *AT & T Communications*, 86 F.Supp.2d at 958.

SWBT now claims that the § 51.315(c)-(f) rules remained binding throughout the arbitration process, so "Southwestern Bell was legally required to offer network element combinations." Br. of Appellant at 61 (emphasis omitted). Therefore, phrasing the issue in terms of waiver, SWBT asserts there was no voluntary and intentional relinquishment of a known right but merely acquiescence in the law. According to SWBT, "the PSC consistently required

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arbitration involved the prices at which the network elements would be offered.").

Southwestern Bell to comply with unlawful combination provisions." *Id.* at 65.[7]

Although the timing of the relevant decisions, agreements, and motions points to the conclusion that SWBT voluntarily agreed to combine unbundled network elements for AT & T, even though the law did not so require when SWBT executed the agreement, this is another question we need not reach.[8] As

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[7] As we have said, under the Act an agreement that is entered into "without regard" to the obligations as set forth in 47 U.S.C. § 251(b) and (c) nevertheless will be enforceable (if approved by the state commission) if it is the product of voluntary negotiations. 47 U.S.C. § 252(a)(1). In other words, if SWBT *voluntarily* (knowledge of the law assumed) agreed to take an action that was not an "obligation" under the Act, there would be no grounds for vacating the agreement as a violation of the Act. Although combining unbundled network elements is not now required by law, it is not forbidden by law.

[8] Substantially similar cases go both ways on this question (and none is binding authority in this Circuit in any event). *Compare US W. Communications, Inc. v. Hix*, 93 F.Supp.2d 1115, 1126 (D.Colo.2000) (finding jurisdiction to review claim where party raised issue with state commission as soon as *Iowa Utilities I* was decided, "[i]n other words . . . as soon as practicable after the law substantially changed on this issue") *and MCI Telecomms. Corp. v. U.S. W. Communications Inc.*, No. C97-1508R, 1998 U.S. Dist. LEXIS 21585, at *8 (W.D.Wash. July 21, 1998) (concluding no waiver because arbitrator applied regulation that had been "repudiated"), *aff'd in part, rev'd and remanded in part on other grounds*, 204 F.3d 1262 (9th Cir.), *cert. denied*, — U.S. —, 121 S.Ct. 504, — L.Ed.2d — (2000) *and AT & T Communications of the S. States, Inc. v. BellSouth Telecomms., Inc.*, 7 F.Supp.2d 661, 670 (E.D.N.C.1998) (striking paragraph in agreement where, "[a]t the time of the Agreement, BellSouth was merely adhering to established FCC rules that § 251(c)(3) compels an ILEC to combine purchased network elements"), *remanded*, 229 F.3d 457 (4th Cir.2000) (agreeing challenge to agreement was cognizable but remanding for review by district court in first instance of paragraph at issue on the merits in light of changes in law); *with U S W. Communications, Inc. v. Worldcom Techs., Inc.*, 31 F.Supp.2d 819, 826 (D.Or.1998) (finding no waiver of challenge to agreement to recombine unbundled elements without discussing fact that agreement was executed more than a month after *Iowa Utilities I* was filed).

we have said, the October 10, 1997, agreement between SWBT and AT & T must be vacated, and there will be new negotiations or arbitrations (as necessary) under a revamped pricing standard, presumably leading to a totally new agreement. Therefore the issue of whether SWBT voluntarily agreed to combine unbundled network elements in the October 10 agreement, when the law did not so require, is moot.

V.

To sum up, we reverse the District Court on the question of TELRIC pricing and remand with instructions to remand to the PSC for further proceedings not inconsistent with this opinion. The network sharing agreement of October 10, 1997, between SWBT and AT & T is vacated. Any new agreement reached with the aid of arbitration by the PSC shall be the result of proceedings that are not offensive to the requirements of procedural due process and shall employ a pricing methodology that is consistent with the Act. The procedural due process challenge raised here is moot and therefore we do not decide the issue. We likewise hold that any question regarding the validity of SWBT's agreement to combine network elements not combined in its own system is moot, inasmuch as the agreement is vacated and will now be subject to renegotiations. Thus, we do not address that question either.

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MISSOURI
Western Division

Nos. 97-1573-CV-W-5, 97-4337-CV-W-5, 98-0540-CV-W-5, 98-0501-CV-W-5

AT & T COMMUNICATIONS OF THE SOUTHWEST, INC.,
Plaintiff,

v.

SOUTHWEST BELL TELEPHONE COMPANY, et al.,
Defendants.

Aug. 31, 1999

ORDER AFFIRMING IN PART AND REMANDING IN PART THE ORDERS OF THE MISSOURI PUBLIC SERVICE COMMISSION

LAUGHREY, District Judge.

These consolidated cases come to this Court for judicial review of an administrative order entered by the Missouri Public Service Commission ("PSC") pursuant to the Telecommunications Act of 1996 ("the Act," "the Telecommunications Act"), Pub.L. 104-104, 110 Stat. 56 (codified at various sections of 47 U.S.C.).[1] The Tele-

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[1] AT & T and SWBT also characterize their briefs as suggestions in support of motions for summary judgment. The Court, however, will treat this case as an appeal from an administrative order. *See* 47 U.S.C. § 252(e)(6) (providing for review of state commission decisions in federal district courts).

communications Act ended the era of monopoly-based local telephone service by eliminating legal barriers to competition and by requiring local telephone companies to lease elements of their existing networks to new competitors. In the absence of an agreement between the local company and its competitors, the Act authorizes state utility commissions to determine the terms of these interconnection contracts and the price which the local company can charge its competitors for interconnection services. These consolidated cases involve interconnection agreements between Southwestern Bell Telephone Company ("SWBT") and AT & T Communications of the Southwest ("AT & T"), which have been ordered by the PSC.

I. *The Telecommunications Act of 1996*

"It would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity. It is in many respects a model of ambiguity or even self-contradiction." *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 738, 142 L.Ed.2d 835 (1999) (Justice Scalia, delivering the opinion of the Court). Even for the United States Supreme Court, interpreting the Telecommunications Act is no simple task. An understanding of the Act's overall structure and purpose therefore provides an essential background for addressing the many issues raised by the parties in these consolidated cases.

Until the 1990s, local telephone service was regarded as a natural monopoly. *Id.* at 726. States, therefore, granted exclusive franchises to one local exchange carrier ("LEC") in each area. In exchange, the LECs were required to provide universal service and were subjected to pervasive regulation by state commissions. This legal arrangement encouraged LECs to develop extensive networks that branched out to reach every customer in a particular area. The networks were expensive to build and maintain, and duplication of a network was thought to be economically infeasible.

In the 1990s, however, technological advances convinced Congress that competition in local telephone markets was not only possible but also desirable. Congress believed that consumers would reap the benefits of competition in the form of lower prices and better quality services. First Report & Order at ¶ 3, *In re Implementation of Local Competition Provisions*, 11 FCC Rcd. 15499 (1996) ("*Local Competition Order*") (listing the principal goals of the Act). Congress, therefore, designed the Act "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act, *quoted in Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir.1997), *rev'd in part on other grounds*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).

To achieve its goal of ending monopoly based local telecommunication services, Congress preempted state laws that granted exclusive franchises to incumbent local exchange providers ("ILECs"). Realizing that potential competitors would be deterred from entering local telecommunications markets if they had to build entire networks from the ground up before they could begin providing services, Congress also required ILECs to share their networks with new competitors referred to as competitor local exchange providers ("CLECs"). S. Conf. Rep. 104-230, at 148 ("it is unlikely that competitors will have a fully redundant network in place when they initially offer local service.").

The Telecommunications Act imposes the following requirements on ILECs. First, an ILEC must allow its competitors to "interconnect" their equipment to the ILEC's network at "any technically feasible point," thus enabling competitors to process telephone calls through the network. 47 U.S.C. § 251(c)(2)(B) (Supp.1998). This interconnection must be "at least equal in quality" to that which the incumbent provides to itself. § 251(c)(2)(C).

Second, an ILEC must provide access to "network elements," on "an unbundled basis." § 251(c)(3). A network element is defined broadly as "a facility or equipment used in the provision of a telecommunications service." § 153(29). Competitors have a right to purchase network elements separately, "in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service." § 251(c)(3). In determining which network elements must be provided, the FCC was directed to consider whether access was "necessary" and whether the failure to provide such access would impair a CLEC's ability "to provide the services that it seeks to offer." § 251(d)(2). The rates ILECs may charge both for interconnection and unbundled network elements ("UNEs") must be "based on the cost . . . of providing the interconnection or network element." § 252(d)(1). Also, both interconnection and UNEs must be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." § 251(c)(2)(D) and (c)(3).

Finally, an ILEC must sell its complete retail services at wholesale prices so that competitors can resell those services to their customers. § 251(c)(4). Wholesale rates are retail rates minus the "costs that will be avoided" by selling to a competitor rather than a customer, such as marketing, billing, and collection. § 252(d)(3). ILECs are forbidden from imposing "unreasonable or discriminatory conditions or limitations" on the resale of these services. § 251(c)(4)(B).

The Act's requirements raise a host of questions when applied to a particular local telephone network. What is a network element? What kind of interconnection or level of unbundling is technically feasible? What are an ILEC's costs of providing services? All such issues must be resolved for incumbents and new competitors to enter interconnection agreements allowing competitors to use incumbents' networks. Parties, state commissions, and courts are to be

guided in their efforts to answer such questions by regulations passed by the Federal Communications Commission ("FCC"). § 251(d)(1). Congress also designed an elaborate dispute resolution system. First, when an incumbent receives a request for interconnection, it may try to reach an agreement with its potential competitor through negotiations. § 252(a). In the event that these negotiations leave some issues unresolved, state utility commissions may arbitrate these disputes, § 252(b)(1), unless the state declines to act, in which case the disputes are arbitrated by the FCC. Congress required that all issues presented for arbitration should be resolved within nine months after the ILEC received the initial request for interconnection. § 252(b)(4)(C). Finally, federal courts hear appeals from the decisions of these state agencies or the FCC. § 252(e)(6) (providing for review in federal district courts).

II. *The PSC's Proceedings*

A. The First Arbitration

After the Telecommunications Act was passed in 1996, AT & T and SWBT began negotiating about an interconnection agreement, but these negotiations failed to resolve all of the issues between them. On July 29, 1996, AT & T filed a Petition for Arbitration with the PSC. On August 16, 1996, MCI filed a similar petition. The PSC consolidated the two cases.

The PSC allowed the parties to file written testimony and held formal hearings including cross-examination between October 8 and October 17, 1996. One key issue in this arbitration was the amount AT & T would be required to pay to use SWBT's network. The parties presented evidence of the Total Element Long Run Incremental Cost ("TELRIC") of providing this access, because FCC regulations then in effect mandated that this methodology be used to determine rates under the Telecommunications Act. *See* 47 C.F.R.

§§ 51.503, 51.505 (1999). On October 15, 1996, however, the Eighth Circuit stayed these regulations in part because it found that the FCC lacked jurisdiction to issue them. *Iowa Utils. Bd.*, 120 F.3d at 799.

On December 11, 1996, the PSC entered an order setting interim rates using the TELRIC methodology. This order also required SWBT to allow AT & T to use its dark fiber and purchase its subloops separately, i.e., unbundled. On December 20, 1996, SWBT moved for rehearing on the grounds that the interim rates should not have been calculated under the stayed FCC regulations that mandated the TELRIC methodology. On January 22, 1997, the PSC denied the motion in a show order.

The PSC next confronted the task of setting permanent rates. It ordered its staff to meet with SWBT personnel for two to three days each week in SWBT's offices, "where software, data, and subject matter experts responsible for critical input values will be readily available." [Order Granting Clarification and Denying Rehearing at 9, Record on Appeal ("ROA") 1117]. AT & T would be excluded from these meetings because "SWBT will perhaps be required to disclose extraordinarily confidential information, including trade secret and other proprietary matter." [*Id.*]. Similarly, staff would meet at AT & T's offices to gather information, and SWBT was excluded from these meetings. Despite AT & T and SWBT's objections, the PSC followed this investigative procedure.

In its Order, the PSC had also announced that it would issue proposed rates and allow the parties to comment before setting permanent rates. [*Id.* at 9-10]. On June 9, 1997, the PSC issued a notice stating that the parties would have 30 days to comment on proposed rates before they were adopted.[2] On July 31, 1997, the PSC issued a Final

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[2] On July 18, 1997, the Eighth Circuit invalidated the FCC's pricing regulations and held that local incumbent providers need not provide

Arbitration Order adopting permanent rates without previously allowing the parties to comment on any proposed rates. The order stated that "in the interests of due process, the Commission will allow the parties twenty days to move for reconsideration or clarification." [Final Arb. Order at 2, ROA 1368]. During this twenty-day period, the order did not go into effect.

The Final Arbitration Order referenced a lengthy Costing and Pricing Report issued by the PSC staff, and explained that it based its decision only on information included in the Report: "The [Report] contains several hundred pages and constitutes a thorough and exhaustive review of each and every cost factor which the Commission finds relevant to this arbitration." [*Id.* at 1371]. The staff considered only competing TELRIC models, even though SWBT had argued that historical costs should be used to set rates. In the Final Arbitration Order, the PSC adopted its staff's recommendations. On August 20, 1997, SWBT moved for rehearing arguing in part that the procedure used to set permanent rates violated numerous statutes and the federal constitution. The PSC denied the motion, arguing that its procedures were proper because it was conducting an arbitration rather than a civil trial.

On October 10, 1997, the parties filed an interconnection agreement ("the Agreement")[3] consistent with the PSC's prior orders. The Agreement included terms stating that SWBT would provide combinations of network elements even if these elements were separate in its own network. On

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combinations of network elements that exist separately in their own networks. *Iowa Utils. Bd.*, 120 F.3d at 799, 813.

[3] The term "Agreement" is something of a misnomer because it refers both to terms ordered by the PSC and terms voluntarily agreed to by the parties. When appropriate for clarification, the Court will distinguish between various arbitral decisions and agreements by using dates or other indicators.

October 30, 1997, SWBT filed a Notice of Clarification advising the PSC that the regulations requiring incumbents to provide combinations of network elements had been vacated by the Eighth Circuit and attempting to preserve its objection to providing combinations of network elements. [ROA 1551]. The Agreement was approved by the PSC on November 5, 1997. In a subsequent Order, the PSC rejected SWBT's argument in the Notice of Clarification, noting that "the Eighth Circuit's recent ruling in *Iowa Utilities Board* has not made SWBT's and AT & T's contract provisions illegal." [ROA 1984].

B. The Second Arbitration

On September 10, 1997, AT & T filed a second petition for compulsory arbitration, alleging that there were still unresolved issues about pricing additional unbundled network elements. On October 24, 1997, AT & T and SWBT filed a joint list of 160 remaining unresolved issues. On October 30, 1997, the PSC announced a different procedure to resolve these issues—a mediation followed by an arbitration. The PSC appointed its general counsel to be a Special Master for the proceeding. Under the announced procedures, the parties were first to file written testimony relevant to each disputed issue. The Special Master and staff were then to conduct a lengthy mediation. After the mediation, AT & T and SWBT were to file a Settlement Document identifying the issues that had been resolved in the mediation. They were also to file a Statement of Remaining Issues in "the form of a single pleading filed jointly by AT & T, SWBT and the Special Master." [Order Adopting Procedural Schedule at 5, ROA 1748]. The Statement was to include AT & T and SWBT's proposed language and the Special Master's recommendation about which proposal should be adopted. AT & T and SWBT could subsequently file responses to the Special Master's recommendations. The PSC would then issue an arbitration

order based on the documents filed and any technical expertise provided by its staff. This procedure was followed.[4]

On December 23, 1997, the PSC issued a Report and Order largely accepting the Special Master's recommendations. It also rejected AT & T's proposal that SWBT be required to purchase all necessary licenses and "right to use agreements" necessary to allow AT & T to use SWBT's network without incurring liability. However, it ordered SWBT to provide a list of all known licences applicable to the relevant network elements, to use its best efforts to facilitate AT & T's attempts to obtain the necessary licences and agreements, and to negotiate for the provision of alternate elements if a necessary license could not be obtained. On March 4, 1998, the parties filed their agreement. The Agreement was approved on March 19, 1998.

C. The Supreme Court's Decision in *Iowa Utilities Board*

On January 25, 1999, the Supreme Court overturned parts of the Eighth Circuit's decision in *Iowa Utilities Board.* Specifically, the Supreme Court held that the FCC had jurisdiction to promulgate regulations under the Telecommunications Act, including the regulations mandating the use of TELRIC methodology to measure costs. *AT & T*, 119 S.Ct. at 732-33. The Court expressly declined to rule on the issue of whether the TELRIC regulations are a valid interpretation of the Telecommunications Act. *Id.* at 728, n. 3. It is expected that the Eighth Circuit will address this issue when the case is remanded. *Id.* at 738. The Supreme Court also vacated an FCC regulation listing network elements that incumbent providers of local telephone service would be required to make available to requesting carriers, on the grounds that these elements were chosen under a faulty interpretation of the Act's necessity and

[4] According to SWBT, the testimony "filed" before the mediation was not placed in the administrative record.

impairment standards. *Id.* at 735 (interpreting 47 U.S.C. § 251(d)(2)). Finally, the high court upheld an FCC regulation requiring ILECs to provide network elements in combination that were already combined in the ILEC's own networks. *Id.* at 738.

Because the Supreme Court's opinion was promulgated after this case had been briefed, the parties were allowed to submit supplemental briefing about the impact of the High Court's decision. The parties were encouraged to discuss what issues in this case had been rendered moot by the decision, and what issues had been affected in some other way.

III. *Standard and Scope of Review*

In this appeal, the scope of review will be limited to the administrative record compiled by the PSC. The statutory language relevant to judicial review reads as follows:

> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). Because the statute simply provides for district court review, without setting forth a specific standard applicable of review, the appeal is confined to the record and no de novo proceeding may be held. *Guaranty Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 794 F.2d 1339, 1342 (8th Cir.1986) (*quoting United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715, 83 S.Ct. 1409, 10 L.Ed.2d 652 (1963)); *accord GTE South, Inc. v. Morrison*, 6 F.Supp.2d 517, 523 (E.D.Va. 1998) (reaching same conclusion in Telecommunications Act case).

In evaluating the record, the Court reviews the PSC's findings of fact under the arbitrary and capricious standard.

See Guaranty Savings & Loan Ass'n, 794 F.2d at 1343 (courts review factual determinations by agencies under arbitrary and capricious standard); *GTE South*, 6 F.Supp.2d at 523 (arbitrary and capricious standard should be used to review state commission decisions under Telecommunications Act); *US West Communications, Inc. v. Hix*, 986 F.Supp. 13, 19 (D.Colo.1997) (same). When applying the arbitrary and capricious standard, courts

> consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. [We are] not empowered to substitute our judgment for that of the agency.

Guaranty Savings & Loan Ass'n, 794 F.2d at 1343 (8th Cir.1986) (*quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971)). This highly deferential standard of review is especially appropriate when reviewing findings of fact made by agencies enforcing the Telecommunications Act, because the findings may be highly technical and specific to any idiosyncrasies in the incumbent carrier's network.

The parties disagree about the standard of review to be applied to the PSC's resolution of questions of law. AT & T and SWBT contend that the PSC's legal conclusions are to be reviewed de novo, while the PSC contends that its interpretations of the Telecommunications Act are entitled to *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* deference. The *Chevron* court explained that federal courts should defer to the legal conclusions of administrative agencies that are based on permissible constructions of ambiguous statutes:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two

> questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

The *Chevron* court based this conclusion on at least two facts—Congress's power to delegate policy decisions to administrative agencies, and the expertise of federal executive agencies. First, the Court explained

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation . . . . If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

Id. at 843-44, 104 S.Ct. 2778 (*citing United States v. Shimer*, 367 U.S. 374, 382, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961)). Second, the Court noted that it should defer to agency conclusions "whenever . . . a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." *Id.* at 844, 104 S.Ct. 2778.

Consistently, however, courts have held that interpretations of federal law by state agencies are not entitled to *Chevron* deference. *See Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir.1997), *cert. denied*, 522 U.S. 1044, 118 S.Ct. 684, 139 L.Ed.2d 632 (1998) (state agency interpretation of Medicaid Act reviewed de novo); *Turner v. Perales*, 869 F.2d 140, 141 (2d Cir.1989) (state agency interpretations of housing statute reviewed de novo); *Amisub (PSL), Inc. v. State of Colo. Dep't of Soc. Servs.*, 879 F.2d 789, 795-96 (10th Cir.), *cert. denied*, 496 U.S. 935, 110 S.Ct. 3212, 110 L.Ed.2d 660 (1990) ("The state agency's determination of procedural and substantive compliance with federal law is not entitled to the deference afforded a federal agency."). These courts have emphasized that "Chevron's policy underpinnings emphasize the expertise and familiarity of the federal agency with the subject matter of its mandate and the need for coherent and uniform construction of a federal law nationwide. Those considerations are not apt [to a state agency]." *Belshe*, 103 F.3d at 1495-96 (*quoting Turner*, 869 F.2d at 141).

Similarly, the district courts that have considered this issue in the context of the Telecommunications Act have concluded that state agencies interpreting this Act are not entitled to *Chevron* deference. *See GTE South*, 6 F.Supp.2d at 524 (legal conclusions by state commissions reviewed) (de novo); *Hix*, 986 F.Supp. at 19 (same). The *Hix* court reasoned that *Chevron* deference would be inappropriate because state commissions, unlike federal agencies, are not subject to congressional oversight, and because state commissions lack the expertise and nationwide perspective of federal agencies in implementing federal law. *Hix*, 986 F.Supp. at 17.

Finally, a de novo standard of review for legal issues raised by the Telecommunications Act is consistent with the text of the Act. Congress provided that federal courts reviewing state commission decisions shall "determine whether the

agreement or statement meets the requirements of section 251 of this title and this section." 47 U.S.C. § 252(e)(6). This language does not suggest a deferential standard of review. The Court, therefore, will review *de novo* whether the PSC's interpretation of the Act was correct.

IV. *Jurisdiction*

On January 23, 1998, the PSC and its officers "the State Defendants" filed a motion to dismiss based in part on Eleventh Amendment immunity. On April 30, 1998, the Court denied the motion. At that time, many federal courts had held that the Eleventh Amendment did not bar suits against state commissions and their officials. *See, e.g., U.S. West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F.Supp.2d 1221, 1229-30 (D.Or.1998); *US West Communications, Inc. v. Public Serv. Comm'n of Utah*, 991 F.Supp. 1299, 1301 (D.Utah 1998). These courts reasoned that states consented to suit by agreeing to arbitrate disputes arising under the Telecommunications Act. *See, e.g., MFS Intelenet*, 35 F. Supp.2d at 1229-30. Such participation was considered a voluntary waiver of Eleventh Amendment immunity. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n. 1, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (noting that states may voluntarily waive their Eleventh Amendment immunity by participating in a federal program).

After this Court denied the motion to dismiss, the Supreme Court rendered its decision in *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). In *College Savings Bank*, the Supreme Court overruled those cases which had held that states "constructively" waived their sovereign immunity by voluntarily participating in activities regulated by federal statutes. *Id.* at 2228 (overruling *Parden v. Terminal Ry. of Ala. State Docks Dep't*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)). In *Parden*, the Supreme Court had allowed employees of a railroad owned and

operated by the State of Alabama to bring an action against the State under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51. The *Parden* court reasoned as follows:

> By enacting the [FELA] . . . Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

377 U.S. at 192, 84 S.Ct. 1207 (*quoted in College Sav. Bank*, 119 S.Ct. at 2226). The *College Savings Bank* Court reversed *Parden*, holding that state sovereign immunity was not subject to "Parden-style waivers." *Id.* at 2229.

However, the Supreme Court noted that Congress may still encourage states to voluntarily waive their immunity by promising a gratuity or gift to states that do so. *Id.* at 1231. The Court therefore distinguished two cases: *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959); and *South Dakota v. Dole*, 483 U.S. 203, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987). *Petty* held that states consented to suit when they entered an interstate compact approved by Congress that included a provision subjecting them to suit. 359 U.S. at 280-81, 79 S.Ct. 785. *South Dakota* held that Congress may condition a grant of funds to states upon their taking certain actions that Congress could not constitutionally require them to take. 483 U.S. at 211-12, 107 S.Ct. 2793. The *College Savings Bank* Court concluded that *Petty* and *South Dakota* remained good law for the following reason:

> Under the Compact Clause . . . States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity. So also, Congress has no obligation to use its Spending Clause power to disburse funds to the States;

> such funds are gifts. In the present case, however, what Congers [sic] threatens if the State refuses to agree to its condition is not the denial of a gift or gratuity, but a sanction: exclusion of the State from otherwise permissible activity.

119 S.Ct. at 2219. Thus, the question for this Court is whether the Telecommunications Act uses a gift or gratuity to entice states to waive their immunity, or whether it compels states to do so by excluding them from otherwise permissible activity.

One district court has held that the rule of *College Savings Bank* barred federal court review of decisions by state commissions under the Telecommunications Act. *Wisconsin Bell, Inc. v. Public Serv. Comm'n of Wis.*, 57 F.Supp.2d 710, 714-15 (W.D.Wis.1999). The court found that the Telecommunications Act imposed a sanction on states that refused to waive their immunity, by restricting their right to regulate telecommunications:

> [A] state's continuing to regulate local telephone carriers is hardly the acceptance of a "gift" in the same way that accepting highway funding is characterized in *College Savings Bank*. A state's continued regulation of local enterprise (local telephone carriers) is an "otherwise permissible activity" that can yield no inference as to a state's motivation for doing it.

Id. at 715-16.

The Court in this case, however, is not reviewing the state's general regulation of the local telecommunications industry. Rather, it is reviewing the PSC's interconnection order to determine if it complies with federal law. Absent Congressional authority, the PSC would have no right to participate in the unique dispute resolution process devised by Congress, in which the PSC is authorized to arbitrate disputes between private telecommunication companies. State

commissions, however, may exercise this privilege only if they consent to federal court review of their actions. § 252(e)(6) (expressly providing for district court review of state commission actions). If a state prefers to retain its sovereign immunity, the FCC "shall assume the responsibility of the State commission under this section." § 252(e)(5). "This statutory structure gives each state the option to involve itself in the regulatory scheme or to let the FCC act in its place." *MCI Telecommunications Corp. v. Illinois Commerce Comm'n*, 183 F.3d 558, 565-66 (7th Cir.1999). Hence, the Act preserves existing state authority to regulate local telecommunications, but the Act does impose obligations on the state if it voluntarily chooses to be the arbiter of disputes involving interconnection agreements.

For these reasons, the Telecommunications Act is analogous to the spending clause cases described in *College Savings Bank*. The Telecommunications Act granted states a right that they previously lacked—the right to participate in the resolution of disputes between ILEC and LEC. The states were free to decline this gratuity if they chose. Indeed, one other district court has already reached this conclusion. *US West Communications v. Mecham*, 2:98CV490K (D.Utah Aug. 16, 1999).

If this Court were to reach the opposite conclusion, then states would be allowed to implement a federal dispute resolution scheme free from judicial review.[5] Although Congress cannot force states to administer federal programs, when states voluntarily participate in such enterprises "the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply." *New York v. United States*, 505 U.S. 144, 179, 112

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[5] State courts lack jurisdiction to review the actions of state commissions. § 252(e)(6). Thus, if federal court review is precluded by the Eleventh Amendment, no court would have jurisdiction over state commission decisions.

S.Ct. 2408, 120 L.Ed.2d 120 (1992). Furthermore, the Supreme Court has emphasized, in *dicta*, that states participating in implementing the Act will be subject to federal oversight: "[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Iowa Utils. Bd.*, 119 S.Ct. at 730, n. 6. For all of these reasons, the Court concludes that the state defendants voluntarily waived their immunity from suit by conducting the arbitrations at issue in these cases.

Furthermore, *College Savings Bank* in no way restricted the applicability of the *Ex parte Young* doctrine to suits against state officials in their official capacities. Under the *Young* doctrine, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern v. Jordan*, 440 U.S. 332, 337, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). For this reason, the Eleventh Amendment presents no barrier to federal court cases against state officials seeking prospective compliance with federal law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). The Supreme Court has recently affirmed the vitality of the *Young* doctrine. *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 2263, 144 L.Ed.2d 636 (1999). The Sixth Circuit and several district courts have already ruled that state commissioners could be sued under *Young* for violating the Act. *Michigan Bell Tel. Co. v. Climax Tel.*, 186 F.3d 726, 730-33 (6th Cir.1999) (suit presented "straightforward *Ex parte Young* case."); *Public Serv. Comm'n of Utah*, 991 F.Supp. at 1300; *MFS Intelenet*, 35 F.Supp.2d at 1229.

Nor is *Young*'s applicability limited by the Supreme Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252, *cert. denied*, 517 U.S. 1133, 116 S.Ct. 1416, 134 L.Ed.2d 541 (1996). The Telecommunication Act's provision for federal judicial

review is far simpler than the "detailed remedial scheme" described in the Indian Gaming Regulatory Act challenged in *Seminole Tribe*. *MCI Telecommunications Corp. v. Illinois Bell Tel. Co.*, 1998 WL 156678 at *11 (N.D.Ill. March 31, 1998) (reaching this conclusion), *but see Wisconsin Bell*, 57 F.Supp.2d at 713-14 (reaching the opposite conclusion). Therefore, even if the Court lacked jurisdiction over the PSC, these cases could proceed against the commissioners in their official capacities.

Finally, to the extent the parties have raised issues related to the validity of regulations adopted by the FCC, this Court lacks jurisdiction. FCC regulations adopted pursuant to the Telecommunications Act may only be challenged in the United States Court of Appeals. 28 U.S.C. § 2342(1) ("The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend . . . or to determine the validity of all final orders of the FCC."); *accord United States v. Any and All Radio Station Transmission Equip.*, 169 F.3d 548, 551 (8th Cir.1999) ("the court of appeals has exclusive jurisdiction to determine the validity of all final orders of the FCC."). For the purposes of this proceeding, therefore, FCC regulations that have not been vacated are authoritative law. *Southwestern Bell Tel. Co. v. Arkansas Pub. Servs. Comm'n*, 738 F.2d 901, 906 (8th Cir.1984) (reversing district court for evaluating validity of FCC regulations because statute grants exclusive jurisdiction over this issue to appellate courts).

V. *Discussion*

On the merits, both AT & T and SWBT appeal from the PSC's decision. SWBT raises the following challenges: (1) the pricing methodology used by the PSC violates the 1996 Act, undermines Congress's intent, and raises constitutional difficulties; (2) the arbitration violated its constitutional right to due process of law; (3) the PSC unlawfully required SWBT to offer network elements in combination; (4) the PSC unlawfully expanded SWBT's obligation to provide network

elements; and (5) the PSC unlawfully failed to provide any means for SWBT to limit its liability to AT & T customers and failed to consider this cost in setting rates. AT & T raises the following challenges to the PSC's decision: (1) the PSC violated the Act by erecting unnecessary and discriminatory restrictions on AT & T's ability to access SWBT's essential elements; and (2) the PSC unreasonably banned "end-user aggregation" and resale of promotional offerings of fewer than 90 days. The Court will address these issues in turn.

A. Whether the PSC's Pricing Decisions were Arbitrary and Capricious

1. Whether the PSC Should Have Used TELRIC Methodology

SWBT originally asserted that the forward-looking TELRIC methodology applied by the PSC violated the Telecommunications Act or the United States Constitution. These claims have been rendered moot by the Supreme Court's decision in *Iowa Utilities Board*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835. When SWBT raised these issues, the regulations requiring state commissions to apply TELRIC methodology had been vacated by the Eighth Circuit on the grounds that the FCC lacked the jurisdiction to promulgate them. *Iowa Utils. Bd.*, 120 F.3d at 799. While this appeal was pending, the Supreme Court reversed the Eighth Circuit's decision and held that the FCC did have jurisdiction to issue the TELRIC regulations. *Iowa Utils. Bd.*, 119 S.Ct. at 733. It also remanded the case to the Eighth Circuit for further proceedings. *Id.* at 738. As noted earlier, validly promulgated FCC regulations are not subject to challenge in district courts. SWBT therefore asks this Court to defer ruling on its challenges to the PSC's application of TELRIC methodology until the Eighth Circuit rules on the validity of the forward-looking TELRIC regulations on

remand.[6] The PSC agrees with SWBT's position that review of the TELRIC issue is premature at this time. AT & T takes the opposite stance, and asks the Court to affirm the PSC's application of TELRIC to set rates.[7]

The Court will not defer ruling on SWBT's challenges to the validity of TELRIC methodology. Resolution of these issues should not be delayed because of the possibility that the Eighth Circuit may vacate the TELRIC regulations when reviewing them under the deferential *Chevron* standard. Because the TELRIC regulations are binding in this proceeding, the Court affirms the PSC's decision to apply the TELRIC methodology to set rates.

2. Whether the PSC Applied TELRIC Arbitrarily and Capriciously

Next, SWBT argues that even if the PSC were correct to apply TELRIC methodology, it "made numerous arbitrary adjustments" when computing forward-looking costs. First, SWBT asserts that the PSC arbitrarily reduced its estimate of nonrecurring costs by fifty percent. SWBT also argues that the PSC improperly excluded inflation from its pricing model when approving a three-year contract. Finally, SWBT asserts that the PSC removed many cost items from the rates of specific elements without then recategorizing these items as "common costs."

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[6] SWBT also argues that the TELRIC regulations are not currently in effect. It reasons that the Eighth Circuit vacated the regulations, and that the Supreme Court did not order their reinstatement. The Court finds this argument disingenuous. The Eighth Circuit vacated the regulations on jurisdictional grounds, 120 F.3d at 794, and the Supreme Court held that the FCC had jurisdiction to issue the regulations. 119 S.Ct. at 731. The Supreme Court thereby reinstated the regulations.

[7] The FCC asks this Court to remand the pricing issues to the PSC with an order to reconsider its pricing decisions in light of the TELRIC regulations. The PSC did apply TELRIC methodology when making its pricing decisions, so a remand on this ground would serve no purpose.

The PSC failed to address these issues in its brief, but AT & T argued that the PSC's decisions were justified. SWBT argues that "AT & T cannot fill the void left by the State agency's failure to defend its decisions." It is true that courts generally limit their review of agency rulemakings to the grounds upon which the agency relied. *See Overton Park*, 401 U.S. at 419, 91 S.Ct. 814 ("post hoc rationalizations" insufficient to support agency decision); *Securities and Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943) (confining review of agency decision to "the grounds upon which the [agency] itself based its action."). However, SWBT does not allege that AT & T is advancing new arguments upon which the PSC did not rely when it made its decisions at the administrative level. Rather, SWBT asserts that any arguments not made by the PSC in this proceeding should be deemed waived. AT & T has standing to defend the PSC's adjudication of its rights under the Telecommunications Act, and the Court will consider its arguments even if they were not advanced by the PSC in this litigation, as long as they are supported by the administrative record. *See Farmers Union Cent. Exch. v. Federal Energy Regulatory Comm'n*, 584 F.2d 408, 417 n. 22 (D.C.Cir.), *cert. denied*, 439 U.S. 995, 99 S.Ct. 596, 58 L.Ed.2d 669 (1978) (winning party in administrative proceeding may defend agency decision in federal court despite agency's refusal to take a position in the litigation).

Proceeding to the merits of SWBT's arguments, the Court rejects SWBT's contention that the PSC arbitrarily excluded 50% its nonrecurring costs ("NRCs") for unbundled network elements ("UNEs"). NRCs are one-time costs that SWBT will experience when it leases its network to AT & T. The PSC decided to reduce SWBT's estimate of NRC's by 50% in its Arbitration Order of July 31, 1997. Attached to this order was a lengthy Costing and Pricing Report ("Report") issued by the PSC Staff. In this Report, the PSC Staff noted that high NRCs created barriers to market entry: "Staff is not

suggesting the cost of NRCs be set solely based upon the incentives they create. Staff does believe that is an important consideration when considering the validity of the information presented by each party and the effect these charges will have on the development of competition." [Report at 129]. SWBT argues that the PSC's decision should be overturned because it impermissibly relied on this policy factor to reduce its estimate of NRCs.

Having reviewed the Report, the Court is convinced that the PSC relied on the effect of NRCs on competition primarily to analyze the credibility of the estimates provided by both parties. Because high NRCs discourage competition, SWBT would be expected to overestimate them, while AT & T would be expected to underestimate them. Furthermore, the PSC based its decision to reduce SWBT's NRCs on flaws in the data from which SWBT compiled its estimate of its NRCs. The PSC Staff expressed concern that SWBT's estimate of labor time was based upon evidence provided by subject matter experts, rather than time and motion studies: "As the labor estimate is the primary input into the NRCs, its accuracy is of utmost importance." [Report at 128]. The Staff also noted that SWBT's labor costs were double-counted. They were included in its estimate of NRCs and in the "labor factors" included in other costs. [*Id.*]. The Staff explicitly based its recommendation on these two problems with SWBT's estimate: "Given that SWBT's estimation of these NRCs is based solely on the opinions of [subject matter experts] and the fact that at least a portion of these NRCs are recovered through the cost factors applied to UNEs, Staff cannot recommend that the Commission accept the NRCs proposed by SWBT." [*Id.* at 131]. Thus, the PSC Staff's reference to a policy factor does not render their measurement of SWBT's NRC's arbitrary and capricious or violative of the Telecommunications Act.

SWBT next argues that the PSC improperly excluded inflation from its pricing model when it approved a three-year contract. The PSC Staff noted that the cost of labor and capital increases over time, but reasoned that this inflation would be offset by increased efficiency. [*Id.* at 126]. SWBT argues that because the PSC's forward-looking methodology already assumed the use of the most efficient technology available, productivity gains that could occur during the duration of the contract had already been taken into account. For this reason, SWBT argues that inflation should have also been included in the pricing model. The PSC Staff specifically considered and rejected this argument in its Report. *Id.* The staff reasoned that the estimates of operating and maintenance expenses were "based upon historic data from the current network." *Id.* Thus, the estimates did "not reflect the productivity gains associated with the new forward-looking technology." *Id.* The PSC's finding that the effects of inflation would be offset by gains in productivity is neither arbitrary nor capricious. Therefore, its ruling will be upheld.

Finally, SWBT argues that the PSC Staff failed to modify the "common cost allocator" to accord with other adjustments it made. Common costs are those that cannot be attributed to a specific network element. Overhead and administrative expenses are examples of common costs. These costs are incorporated into the pricing model by including a multiplier to the rate charged for each network element. This multiplier is the common cost allocator. The PSC adopted the common cost allocator proposed by SWBT. Nevertheless, SWBT argues that when the PSC Staff removed some of the cost items from the rates for network elements, it should have recategorized "at least some of" these rejected network element costs as common costs and adjusted the common cost allocator accordingly. [SWBT Sugg. at 36]. SWBT has not shown that the PSC's decision was arbitrary or capricious, because it has failed to note any

specific costs that should have been recharacterized as common costs. SWBT has not demonstrated that any of the costs excluded by the PSC were even related to common costs such as overhead and administrative expenses. Thus, SWBT has fallen far short of demonstrating that the PSC acted arbitrarily or capriciously in failing to recharacterize the excluded costs as common costs.

B. Whether the PSC's Procedures Were Adequate

1. Whether the PSC Violated SWBT's Right to Due Process

SWBT's due process argument originally focused on its complaint that the PSC refused to allow it to submit evidence relevant to the selection of a pricing methodology and to its historic costs. [SWBT Sugg. at 23]. SWBT asserted that the PSC should have used historic costs to set rates, and that its failure to consider these costs violated due process. Because the Supreme Court upheld the TELRIC regulations in *Iowa Utilities Board*, however, SWBT can no longer make this argument. As explained in the previous section, these regulations mandate that rates be set using forward-looking costs rather than historic costs. Thus, SWBT suffered no prejudice from the PSC's refusal to consider evidence of historic costs. Nevertheless, in its supplemental briefing SWBT continued to advance a due process challenge. SWBT's due process argument now focuses on additional procedures it claims were constitutionally required, without alleging how the PSC's decisions would have been different if these procedures had been used.

To determine whether agency procedures accord with the constitutional guarantee of due process, courts examine the context of each case. Different amounts of process are due in different situations: "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct.

2593, 33 L.Ed.2d 484 (1972); *accord Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230, *cert. denied*, 368 U.S. 869, 82 S.Ct. 22, 7 L.Ed.2d 70 (1961); *Hannah v. Larche*, 363 U.S. 420, 442, 80 S.Ct. 1502, 4 L.Ed.2d 1307, *reh'g denied*, 364 U.S. 855, 81 S.Ct. 33, 34, 5 L.Ed.2d 79 (1960). The burden of proving that constitutional guarantee of due process has been violated rests with the party claiming that the violation occurred. *See, e.g., Keith Fulton & Sons, Inc. v. New England Teamsters and Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1140 (1st Cir.1985) (*citing Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)).

The parties present the Court with three competing lines of cases that they claim define the requirements of due process in this case. The PSC cites cases upholding voluntary arbitration procedures against due process attacks. SWBT relies on cases interpreting the requirements of due process in the context of administrative hearings. Finally, AT & T cites cases describing the requirements of due process in agency rulemaking proceedings. However, the PSC's arbitrations were not rulemaking proceedings, true adjudications, or voluntary arbitrations. The PSC's arbitrations were obviously not voluntary, because SWBT was required to participate. More process is required when arbitration is mandatory than when it is voluntary:

> The simple and ineradicable fact is that voluntary arbitration and compulsory arbitration are fundamentally different if only because one may, under our system, consent to almost any restriction upon or deprivation of a right, but similar restrictions or deprivations if compelled by government must accord with procedural and substantive due process.

United States v. American Soc'y of Composers, Authors, and Publishers, 708 F.Supp. 95, 96-97 (S.D.N.Y.1989). Also,

while the arbitrations included aspects of both rulemaking and adjudication, they do not fit neatly into either category. To determine whether an agency proceeding is a rulemaking or an adjudication, courts consider several factors. One factor is whether the agency action "single[s] out any particular [party] for special consideration based on its own peculiar circumstances." *United States v. Florida East Coast Ry.*, 410 U.S. 224, 246, 93 S.Ct. 810, 35 L.Ed.2d 223 (1973), *aff'd*, 417 U.S. 901, 94 S.Ct. 2595, 41 L.Ed.2d 207 (1974). Another factor is whether the agency's decision is prospective or retrospective. *Virgin Islands Hotel Ass'n, Inc. v. Virgin Islands Water and Power Auth.*, 476 F.2d 1263, 1268 (3d Cir.), *cert. denied*, 414 U.S. 1067, 94 S.Ct. 576, 38 L.Ed.2d 472 (1973). Retrospective decisions are more likely to be adjudications. Finally, courts consider whether historical or policy factors are more important to the decision. *Id.* Applying these factors to this case reveals that the arbitrations combined aspects of both adjudication and rulemaking. While the PSC's proceedings were quite fact-specific, the resulting decision was prospective and rested on both historical and policy factors. Thus, none of the lines of cases cited by the parties controls this case.

Only a few cases have interpreted the Due Process Clause in the context of mandatory arbitrations like those conducted by the PSC. Essentially, these precedents have applied the balancing of public and private interests described in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). *See, e.g., Republic Indus., Inc. v. Teamsters Joint Council No. 83 of Va. Pension Fund*, 718 F.2d 628, 640 (4th Cir.), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984) ("Congress may require arbitration so long as fair procedures are provided and ultimate judicial review is available"); *see also Lyeth v. Chrysler Corp.*, 929 F.2d 891, 896 (2d Cir.1991). *Mathews* balanced three factors to determine the requirements of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. Under the *Mathews* balancing test, administrative agencies need not follow the same procedures as federal district courts:

> The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and an opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-172, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurther, J, concurring). All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," *Goldberg v. Kelly*, 397 U.S. 254, 268-269, 90 S.Ct. 1011, 25 L.Ed.2d 287 (footnote omitted) to insure that they are given a meaningful opportunity to present their case.

Id. at 348-49, 96 S.Ct. 893.

The private interest at stake in these arbitrations was obviously quite large. SWBT had invested billions of dollars in its network, and the PSC proceedings determined the terms and conditions under which SWBT would be required to lease that network to its competitor. However, the governmental interest in the arbitrations was also significant. Congress passed the Telecommunications Act "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American

telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Telecommunications Act of 1996, Pub.L. No. 104-104 (1996), *quoted in Iowa Utils. Bd.*, 120 F.3d at 791-92. To secure these advantages for consumers as soon as possible, Congress required that interconnection agreements be arbitrated within nine months[8] of a potential competitor's request for interconnection. *Id.* at 791-92; 47 U.S.C. § 252(a); 47 U.S.C. § 252(b)(1). Despite these deadlines, the first arbitration took more than one year, and the second took more than six months.[9] After reviewing the record, the Court is convinced that the PSC and the parties worked diligently during this period to develop the interconnection agreement. In short, the private interest at stake in the arbitration weighs in favor of extensive procedures, while the public interest weighs in favor of a prompt resolution. The remaining question is whether the value of the additional safeguards proposed by SWBT outweighs their cost.

SWBT points to four procedural safeguards that it alleges that the PSC failed to provide at various times during the two arbitrations at issue. First, SWBT argues that the PSC should have avoided *ex parte* contacts during the permanent pricing phase of the first arbitration. Second, SWBT asserts that the PSC should have placed all information upon which it relied in the formal record. Third, SWBT asserts that the PSC should have allowed it to cross-examine AT & T's witnesses during both arbitrations. Finally, SWBT contends that it should have been allowed to present testimony directly to the PSC during the second arbitration.

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[8] Of course, Congress cannot override the requirements of due process by imposing arbitrary time limits for the resolution of disputes. Rather, this time limit is a relevant indication of society's interest in rapidly introducing competition to the local telephone market.

[9] As described in the fact section of this opinion, for a few months both arbitrations proceeded simultaneously.

As SWBT's counsel admitted in oral argument, SWBT has made no specific allegation that it was prejudiced by the PSC's failure to follow its recommended procedures. Most claims of due process violations require a specific allegation of prejudice. *Estes v. State of Texas*, 381 U.S. 532, 542, 85 S.Ct. 1628, 14 L.Ed.2d 543, *reh'g denied*, 382 U.S. 875, 86 S.Ct. 18, 15 L.Ed.2d 118 (1965); *accord Griffin-Bey v. Bowersox*, 978 F.2d 455, 456 (8th Cir.1992); *United States v. Hood*, 593 F.2d 293, 296 (8th Cir.1979). This rule is also applied in administrative cases. *See, e.g., United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir.1995) (due process challenge to deportation hearing); *Citizens State Bank of Marshfield, Mo. v. Federal Deposit Ins. Corp.*, 751 F.2d 209, 213-14 (8th Cir.1984) (due process challenge to FDIC adjudication). In the absence of a specific allegation of prejudice, a litigant making a due process challenge must show that the "procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Estes*, 381 U.S. at 544, 85 S.Ct. 1628 (holding that the use of television cameras in the courtroom violated a criminal defendant's right to due process, even though it was difficult to discern exactly how the defendant had been prejudiced). Because SWBT has made no specific allegation of prejudice, it must show that the PSC's procedures were inherently lacking in due process such that prejudice should be presumed.

Regarding *ex parte* contacts, the Court first notes that SWBT has not established that the PSC relied on any secret information. The PSC's order adopting permanent rates attached a lengthy report detailing all of the facts upon which it relied: "The Costing and Pricing Report contains several hundred pages and constitutes a thorough and exhaustive review of each and every cost factor which the Commission finds relevant to this arbitration." [ROA at 1371]. The Costing and Pricing Report was included in the record certified to this Court for review. "The designation of the

administrative record, like any established administrative procedure, is entitled to a presumption of administrative regularity. The court assumes the agency properly designated the administrative record absent clear evidence to the contrary." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir.1993) (citation omitted). Thus, the Court will presume that all of the information underlying the PSC's order was set forth in the Costing and Pricing Report.[10]

Nevertheless, SWBT makes a strong argument that the *ex parte* contacts rendered the arbitration at issue inherently lacking in due process. The PSC relied heavily on its staff's recommendations when setting rates, and these staff members had met extensively with AT & T before making their recommendations. Such contact between close aides to the decisionmaker and a party about the merits of a decision ordinarily should occur only in the presence of the other party. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 57 (D.C.Cir.) *cert. denied*, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977) (decisionmakers should refuse to engage in *ex parte* communication with interested parties). The prohibition of *ex parte* contacts ensures that parties may respond to the evidence against them and explain any errors in their opponent's analysis. Thus, the PSC's decision to meet separately with AT & T and SWBT was highly irregular,[11] and could violate due process if it had prejudiced SWBT.

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[10] The cases cited by SWBT holding that *ex parte* contacts violated due process were all cases where the agency relied on information from outside the record. *See, e.g., Ohio Bell Tel. Co. v. Public Utils. Comm'n of Ohio*, 301 U.S. 292, 300, 57 S.Ct. 724, 81 L.Ed. 1093 (1937). These cases are distinguishable because SWBT has not established that the PSC relied on information that was not placed in the record in the Costing and Pricing Report.

[11] This case amply demonstrates that "alternative dispute resolution," far from being a panacea, has is own challenges and deficiencies.

After lengthy deliberation, however, the Court concludes that the PSC's investigation was not so irregular that prejudice should be presumed. The contacts between PSC staff and AT & T were not secret. Rather, the PSC explained to both parties the procedure it would follow to gather information. Having gathered the relevant information, the PSC then shared all relevant facts with SWBT, and allowed it to move for reconsideration. If SWBT found some flaw in the PSC's facts, it could have corrected it at that time. *See Home Box Office*, 567 F.2d at 57 (any *ex parte* contacts that occur should be summarized on the record so that opposing parties may respond); *Overton Park*, 401 U.S. at 420, 91 S.Ct. 814 (in most cases, court should not require testimony regarding the evidence an agency considered to reach a decision). Thus, the Court concludes that SWBT's due process rights were not violated by the *ex parte* contacts between PSC staff and AT & T.

SWBT further asserts that the PSC failed to place the evidentiary basis of its decisions in the formal record for this Court to review. Due process ordinarily requires that agencies place the full evidentiary basis of their decisions in the record, so that courts can conduct meaningful appellate review. *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 533 (D.C.Cir.1978). SWBT emphasizes that the PSC failed to conduct the second arbitration on the record. The procedure used in the second arbitration was a hybrid of mediation and arbitration. The mediation was an off the record proceeding designed to help the parties reach agreements about contested issues. At the time of the mediation, the parties were aware that any remaining disputes would be arbitrated by the PSC. Because none of the issues resolved in the mediation are contested in this case, the Court's review is not at all impeded by the lack of a formal record of the mediation. SWBT also notes that the testimony submitted before the mediation was not admitted into evidence. SWBT concedes, however, that "this testimony

was of minimal use even to the Special Master." [SWBT Sugg. at 20]. Thus, SWBT has not shown that judicial review is in any way impeded by the omission of this testimony from the record presented to this Court. Indeed, the voluminous record submitted has proven more than adequate to allow this Court to review each challenge raised by the parties to the PSC's decisions.

SWBT also argues that all testimony should have been cross-examined. However, such a procedure would have greatly increased the cost of the arbitrations without significantly improving the accuracy of the PSC's decisions. During the arbitrations, the PSC often relied on written testimony. Requiring these witnesses to testify only in person would have greatly lengthened the PSC's proceedings. Also, the probable value of cross-examination in a case involving technical issues is less than in a case in which a witness's credibility and veracity are at issue. "A number of courts have held in cases which . . . involved complex and technical factual controversies, that written submissions, possibly supplemented by oral argument, suffice." *Virgin Islands Hotel Ass'n*, 476 F.2d at 1268; *accord Louisiana Ass'n of Independent Producers and Royalty Owners v. F.E.R.C.*, 958 F.2d 1101, 1113 (D.C.Cir.1992) (cross-examination not required on a "purely technical issue capable of being resolved not on the basis of a witness's motive or memory, but rather upon an analysis of the conflicting data and a reasoned judgment as to what the data shows."). Technical cases like this one typically turn on inferences to be made from fact, rather than upon the credibility of witnesses. Such inferences are best supported by argument, rather than live testimony. The record reveals that SWBT was provided with several opportunities to present such argument. For this reason, the Court is unconvinced that the PSC's refusal to allow cross-examination of some witnesses violated due process.

Finally, the Court is unconvinced that the PSC's refusal to allow SWBT to submit additional evidence at some points in the arbitrations violated SWBT's constitutional rights. SWBT was not allowed to submit any testimony about the propriety of TELRIC methodology, but as noted in the previous section, the propriety of TELRIC methodology cannot be challenged in this Court. SWBT's only other claim is that it should have been allowed to present additional testimony during the second arbitration. SWBT admits that it was allowed to submit written testimony to the Special Master who conducted the mediation segment of this arbitration and to participate in several days of oral presentations before the Special Master. Furthermore, after the Special Master issued his recommendations, SWBT was allowed to file a formal response with the PSC before the final Report and Order was issued. SWBT objects because it was not allowed to submit further testimony after the mediation but before the Special Master issued his recommendations. Given the many opportunities SWBT had to present information to the Special Master, it cannot seriously contend that it was denied the opportunity to be heard.

In sum, SWBT has not shown that it was prejudiced by any of the alleged procedural defects in the PSC's arbitrations. Given the likely cost and limited value of the additional safeguards SWBT proposes, along with the substantial government interest in introducing competition into the local telecommunications market, SWBT has failed to establish that the *Mathews* balance tips in its favor.[12]

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[12] The Court's finding that the minimal requirements of due process were satisfied in this case, should not be interpreted as an endorsement of the approach taken by the PSC.

2. Whether the PSC's Procedures were Arbitrary and Capricious

Next, SWBT argues that the PSC's procedures were arbitrary and capricious. Much of SWBT's briefing on this point repeats its procedural due process arguments. The Court will not reiterate its analysis of these arguments. SWBT does make one new allegation in its claim that the PSC acted arbitrarily and capriciously, which is that the PSC did not follow its own announced procedures. Agencies generally have a duty to follow their own announced rules. *Gardner v. F.C.C.*, 530 F.2d 1086, 1090 (D.C.Cir.1976). The *Gardner* court reversed an agency decision after the agency promised to give the parties personal notice of its decision and then neglected to do so. The D.C. Circuit reasoned that "the Commission has created a reasonable expectation in the parties to the proceeding that such notice will be received . . . . Thus having created the expectation, the Commission ought not to be heard to say that its own rule does not create a legal burden of giving notice." *Id.*

In this case, SWBT alleges that the PSC issued a formal letter on June 17, 1996, stating that the arbitration would be conducted under procedures applicable to contested cases, and that *ex parte* contacts would be prohibited. SWBT argues that it was arbitrary and capricious for the PSC to ignore these announced procedures during the permanent pricing phase of the first arbitration and the entirety of the second arbitration. AT & T argues that the letter established procedures only for the first phase of the first arbitration. Even if the letter purported to set procedures for the entire arbitration, it was not arbitrary or capricious for the PSC to change those procedures for the permanent pricing phase of the first arbitration and the second arbitration. Unlike the agency in *Gardner*, the PSC notified the parties of the procedure it would follow at each phase of the arbitrations. Before the permanent pricing phase of the first arbitration, the

PSC issued an order establishing the procedure for setting permanent rates. The Order of January 22, 1997, stated that the PSC Staff would conduct investigations at the offices of AT & T and SWBT. During these meetings, the staff would allow the parties to explain their costing models and inputs. The Staff was then to issue proposed rates. Similarly, on October 30, 1997, the PSC announced yet another procedure for the second arbitration. In this proceeding, the Special Master was to conduct a mediation which would be followed by an arbitration. The PSC also announced that it would base its decision in the arbitration on the pleadings filed and its own technical expertise. The Court does not find it arbitrary or capricious for the PSC to conduct the three phases of the arbitrations in this case under three different procedures. For each of the arbitrations, the PSC first announced the procedure that it would use and then proceeded to follow that procedure. The PSC was well within its discretion to use different procedures to suit the various stages of the arbitrations at issue in this case. *See Iowa Beef Processors, Inc. v. Illinois Central Gulf R.R. Co.*, 685 F.2d 255, 259 (8th Cir.1982) (noting that agency procedures are more flexible than court procedures).

SWBT also argues that the PSC violated its own procedures by failing to allow comments on proposed rates before they were adopted. The PSC announced on January 22, 1997, and June 9, 1997, that the parties would have an opportunity to respond to the staff's pricing recommendations before they were adopted. The PSC instead adopted permanent rates on July 31, 1997, and allowed the parties to move for reconsideration. The order had a delayed effective date of August 20, 1997. SWBT argues that the PSC's decision should be reversed under the rule of *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir.1979). In that case, the Eighth Circuit noted that "[p]ermitting the submission of views after an administrative decision has been made is no substitute for the right of interested persons to

make their views known to the agency in time to influence the administrative process in a meaningful way." *Id.* at 720 (internal quotation omitted). Unlike the plaintiffs in *Oglala Sioux Tribe*, however, SWBT had several opportunities to make its views known to the PSC before permanent rates were set. The PSC decided to issue permanent rates without allowing the parties to comment on proposed rates to expedite an arbitration that had gone on for far longer than the nine months allowed by the Telecommunications Act:

> The Commission finds it appropriate to establish permanent rates at this time so that this matter may be resolved in such a way as to maximize the opportunities for these parties to move Missouri toward local competition. Rather than delay this matter by an additional 30 days for comment, the Commission will make this its final order. However, in the interests of due process, the Commission will allow the parties twenty days to move for reconsideration or clarification.

[Final Arbitration Order, ROA 1370]. Given the time constraints on the arbitration, the PSC was not arbitrary or capricious when it decided to issue permanent rates, but make them subject to a 20-day comment period.

3. Whether the PSC Violated State Statutes and Regulations

SWBT finally argues that the PSC's procedures during the arbitrations violated several state statutes and regulations. Because the PSC's arbitration was a *sui generis* proceeding, no state procedural law was controlling. *See US West Communications, Inc. v. Minnesota Pub. Utils. Comm'n*, 55 F.Supp.2d 968, 986-88 (D.Minn.1999) (reaching this conclusion under Minnesota law). Congress required that disputes under the Telecommunications Act be resolved by arbitration. The plain meaning of this term would indicate that Congress did not intend for commissions to use

traditional state law methods of rulemaking or adjudication to resolve disputes.

Even if Congress intended to incorporate state procedural law in the Telecommunications Act, the PSC did not violate Missouri law in conducting the arbitrations. First, SWBT contends that the arbitration qualifies as a "contested case" under MAPA. MAPA imposes several procedural requirements in a contested case, which is defined as "a proceeding before an agency in which legal rights, duties, or privileges of specific parties are required by law to be determined after a hearing." Mo.Rev.Stat. § 536.010(2). "The 'law' referred to in the contested case definition encompasses any statute or ordinance, or any provision of the state or federal constitutions that mandates a hearing." *State ex rel. Yarber v. McHenry*, 915 S.W.2d 325, 328 (Mo. banc 1995). Thus, SWBT argues, MAPA applies to the arbitration at issue in this case, because the decision could not be made without a hearing because of the due process clause. SWBT also alleges that the PSC violated a section of Missouri's Uniform Arbitration Act. This statute provides that parties to arbitrations "are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing." Mo.Rev.Stat. § 435.370(2).

The PSC correctly points out that its proceedings are not governed by MAPA or Missouri's Uniform Arbitration Act. Rather, the PSC is allowed to design its own procedures. Mo.Rev.Stat. § 386.410(1) ("All hearings before the [Public Service] Commission or a Commissioner shall be governed by rules to be adopted and prescribed by the Commission."); *State ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n*, 592 S.W.2d 184, 187 (Mo.App.1979) (holding that MAPA does not apply to the PSC because this agency already had its own procedures before MAPA was passed and because MAPA was intended to apply only to agencies who had not yet developed to their own procedures).

SWBT also asserts the PSC violated a section of the Missouri statute governing proceedings before the PSC, Mo.Rev.Stat. § 386.420(1). This section grants parties the "right to be heard and to introduce evidence." *Id.* SWBT has not met its burden to prove that this statute was violated. As noted earlier, the PSC granted SWBT the opportunity to be heard and to introduce evidence.

SWBT finally argues that the PSC violated its own regulations, which provide that "[i]n any hearing before the Commission, [contested case procedures] shall apply, as supplemented by these rules," 4 C.S.R. 240-2.130(1) (1999), *see also*, 4 C.S.R. 240-4.020(6) (1992). The PSC argues that this regulation applies only to "hearings," rather than to arbitrations conducted pursuant to the federal Telecommunications Act. This Court will defer to the PSC's interpretation of its own regulations as long as it does not violate a constitution or statute and it is not plainly erroneous or inconsistent with the regulation. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945) (defining this standard to evaluate federal agency's interpretations of its own regulation); *Smith v. Sorensen*, 748 F.2d 427, 432 (8th Cir.1984), *cert. denied*, 471 U.S. 1054, 105 S.Ct. 2116, 85 L.Ed.2d 480 (1985) (state agency's interpretation of its own regulation should be given "significant weight"). Under the *Seminole Rock* standard, the Court will defer to the PSC's interpretation that contested case procedures do not apply to arbitrations conducted pursuant to the Telecommunications Act.

C. Whether the PSC Unlawfully Required SWBT to Combine Network Elements

SWBT next argues that the PSC violated the Telecommunications Act when it required SWBT to provide combinations of network elements that were not currently combined in SWBT's network. AT & T responds that SWBT

waived this argument when it voluntarily agreed to combine network elements. For the reasons explained below, the Court agrees with AT & T.

SWBT argues that it only agreed to combine network elements because it was under a legal obligation to do so when the Agreement was filed. However, neither FCC regulations nor PSC rulings required this when SWBT filed the interconnection agreement on October 10, 1997. Although FCC regulations once required incumbents to combine elements, 47 C.F.R. § 51.315(c)—(f), these regulations were vacated by the Eighth Circuit in July 1997. *Iowa Utils. Bd.*, 120 F.3d at 813 (vacating 47 C.F.R. § 51.315(c)-(f)).[13]

Because the FCC regulations had been vacated, SWBT was under no obligation to combine network elements for AT & T that were separate in its own network. Nevertheless, SWBT submitted an agreement stating that it would combine network elements. Although SWBT later objected that this act was involuntary, it failed to make a contemporaneous objection when submitting the agreement. Consequently, the

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[13] A distinction must be made between regulations requiring SWBT not to separate network elements that were combined in its own network if the elements are requested in combination, and those requiring SWBT to combine network elements that existed separately in its network if requested. The FCC regulation requiring SWBT not to separate elements, 47 C.F.R. § 51.315(b), was still in effect when the agreement was filed. Four days later, the Eighth Circuit amended its decision in *Iowa Utilities Board* to also vacate this regulation. 120 F.3d at 813 (as amended on rehearing, vacating 47 C.F.R. § 51.315(b)). When *Iowa Utilities Board* went up to the Supreme Court, the regulation forbidding incumbents from separating elements was reinstated. *Iowa Utils. Bd.*, 119 S.Ct. at 737-38 (reinstating 47 C.F.R. § 51.315(b)). SWBT originally alleged that it could not be forbidden to separate elements that were already combined in its network. SWBT admits that this issue has been rendered moot by the Supreme Court's decision reinstating 47 C.F.R. § 51.315(b). 119 S.Ct. at 737-38.

PSC noted that the Eighth Circuit's ruling in *Iowa Utilities Board* did not prohibit incumbents from agreeing to combine network elements, and then required SWBT to do so. [Report and Order of December 23, 1997, ROA 1980-82]. This reasoning included at least an implicit finding that SWBT voluntarily agreed to combine network elements. That finding was neither arbitrary nor capricious.

Having found that AT & T and SWBT had reached an agreement on this issue, the PSC was well within its authority to enforce that agreement. Such party negotiations are the first and arguably most important of the dispute resolution mechanisms that Congress incorporated into the telecommunications act. *See* 47 U.S.C. § 252. The PSC therefore properly required SWBT to abide by its contractual agreement.

D. Whether the PSC Unlawfully Expanded SWBT's Obligation to Provide Network Elements

SWBT contends that the PSC violated the Telecommunications Act when it required SWBT to provide dark fiber and to unbundle subloops. The Act requires incumbents to provide unbundled access to network elements, 47 U.S.C. § 251(c)(3), which are "facilit[ies] or equipment used in the provision of a telecommunications service." 47 U.S.C. § 153(29).

SWBT first argues that dark fiber is not a network element. Dark fiber is fiber optic cable that is not currently connected to electronic equipment and is not currently being used to provide services. In fact, as soon as dark fiber is "lit" by being connected to electronic equipment and used to provide telecommunications services, it ceases to be dark fiber. SWBT, therefore, reasons that because dark fiber is, by definition, not being used to provide telecommunications service, it falls outside the definition of network elements.

This almost metaphysical argument cannot succeed. The Eighth Circuit has noted that the term "network element" should be interpreted broadly to encompass "all of the facilities that are used in the overall commercial offering of communications." *Iowa Utils. Bd.*, 120 F.3d at 809. SWBT proposes a narrow interpretation of the term, essentially arguing that when Congress defined network elements as "equipment used in the provision of a telecommunications service," it meant to limit this definition to equipment currently being used by a particular provider. Given the purpose of the Telecommunications Act and the Eighth Circuit's guidance, the Court rejects SWBT's invitation to read a "temporal qualifier" into this statute. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (refusing to read Title VII's definition of "employees" to refer only to current employees).

SWBT also argues that because dark fiber is not currently connected to SWBT's network, it is inventory rather than equipment. Unbundled network elements include only equipment used in providing telecommunications services. 47 U.S.C. § 153(29). The Court, however, agrees with the PSC that dark fiber is equipment. Dark fiber is cable that has already been placed in the ground, which could be used to transmit calls if it were connected to the proper electronics. Such cable, once it is connected to the rest of a network, is commonly used to provide telecommunications service. For this reason, "dark fiber falls clearly within the definition of a network element." *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 7 F.Supp.2d 674, 680 (E.D.N.C.1998).

SWBT next argues that the PSC ignored its arguments that providing access to dark fiber and unbundling subloops[14]

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[14] Subloop unbundling occurs when an ILEC allows a requesting carrier to access specific parts of a local loop, the wiring that connects

were technically infeasible, and that it therefore had no duty to provide such access. *See* 47 U.S.C. § 251(c)(3) (ILECs have no duty to provide unbundled access unless it is technically feasible). It is by now well-established that agencies must give reasons for their decisions. *See Menorah Med. Ctr. v. Heckler*, 768 F.2d 292, 295 (8th Cir.1985) (requiring an agency "to articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."). Although courts "may not supply a reasoned basis for the agency's decision that the agency itself has not given," *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983), *cert. denied*, 480 U.S. 951, 107 S.Ct. 1616, 94 L.Ed.2d 800 (1987), they will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974).

In this case, the path of the PSC can reasonably be discerned, and its decision should therefore be upheld. Restrictions on access are presumed to be unreasonable, and SWBT had the burden of proving infeasibility by clear and convincing evidence. *MCI Telecommunications Corp.*, 7 F.Supp.2d at 680; 47 C.F.R. § 51.5. Regarding dark fiber, the PSC emphasizes that SWBT only alleged that providing access would interfere with testing and maintenance, but that testimony indicated that such testing and maintenance could be performed by the CLECs using the dark fiber. Similarly, SWBT fell far short of proving by clear and convincing evidence that unbundling subloops was technically infeasible. In this appeal, they point to the testimony of William C. Deere, who testified that subloop unbundling could cause a network failure and would reduce SWBT's ability to manage

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each customer to the network. Competitors can then process calls by connecting their equipment to certain subloops and bypassing others.

its network. This testimony did not establish the "specific, significant, and demonstrable network liability concerns" necessary to prove technical infeasibility.[15] 47 C.F.R. § 51.5. Although it would have been preferable for the PSC to explain specifically why it rejected SWBT's infeasibility argument in the arbitration order, its failure to do so does not require a remand. The qualified nature of the testimony, combined with the PSC's conclusion that SWBT must provide access to dark fiber and unbundled subloops, convinces this Court that the PSC reasonably concluded that SWBT failed to meet its burden of proving technical infeasibility.

Finally, SWBT argues that the PSC applied the wrong standard to determine whether SWBT must provide access to these elements in light of the Supreme Court's decision in *Iowa Utilities Board*. The Telecommunications Act directed the FCC to determine what network elements should be made available on an unbundled basis by considering at least the following two factors: first, whether the elements are necessary; and second, whether the failure to provide them would impair requesting carriers' ability to provide the services they seek to offer. § 251(d)(2). In interpreting these sections, the FCC stated that access was "necessary" even if "requesting carriers can obtain the requested proprietary element from a source other than the incumbent [because] requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." *Local Competition Order* at ¶ 283. The FCC also stated that the "impairment" standard would be

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[15] AT & T also emphasizes that other ILECs are currently unbundling subloops under their interconnection agreements, thus providing further reason to doubt SWBT's claim that subloop unbundling is technically infeasible. [AT & T Opp. at 38, n.19].

met if "the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network." *Id.* at ¶ 285.

Under these standards of necessity and impairment, the FCC promulgated the regulation codified at 47 C.F.R. § 51.319. The regulation required SWBT to provide AT & T with access to at least the following network elements: (1) the local loop; (2) the network interface device; (3) switching capability; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) operations support systems functions; and (7) operator services and directory assistance. § 51.319(a)—(g). The Supreme Court vacated this regulation in *Iowa Utilities Board*, reasoning as follows:

> The Commission's premise was wrong. Section 251(d)(2). . . . requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements. The latter is not achieved by disregarding entirely the availability of elements outside the network, and by regarding any "increased cost or decreased service quality" as establishing a "necessity" and an "impair[ment]" of the ability to "provide . . . services."

Iowa Utilities Bd., 119 S.Ct. at 736.

The FCC has also promulgated a "catch-all" regulation under which state commissions determine whether ILECs should be required to provide access to equipment and facilities not listed in § 51.319. Section 51.317(b) requires that any element that it is technically feasible for an incumbent to provide on an unbundled basis must be

provided unless either: (1) the element was proprietary or contained proprietary information, and a requesting carrier could offer the same service by using other nonproprietary unbundled elements within the incumbent's network; or (2) failure to provide the element would not decrease the quality or increase the administrative cost of the services the requesting carrier planned to offer. 47 C.F.R. § 51.317(b).[16] In this way, § 51.317 incorporated the FCC's necessity and impairment standards. Nevertheless, the Supreme Court did not vacate § 51.317, even though it rested on the same necessity and impairment standards it criticized when vacating § 51.319. Dark fiber and unbundled subloops were not among the elements specifically listed in the vacated regulation. Therefore, the PSC considered whether SWBT must provide access to them under the catch-all regulation, § 51.317.

SWBT argues that § 51.317 is no longer a valid regulation, because the Supreme Court condemned the FCC's necessity and impairment standards when it vacated § 51.319. SWBT also emphasizes that the PSC admits it applied an invalid standard when determining whether it should be required to provide access to dark fiber and unbundled subloops.[17]

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[16] Although the Supreme Court did not vacate this regulation, the Eighth Circuit had previously vacated it to the extent that it created a presumption that a network element must be unbundled if it is technically feasible to do so. *Iowa Utilities Bd.*, 120 F.3d at 810, n. 30. In this opinion, all citations to § 51.317 refer to that regulation as it was modified by the Eighth Circuit.

[17] The PSC admits that its "determination that access must be provided to dark fiber and subloop elements was based on that same 'impairment' standard, as was then required by the FCC's now invalid rule [§ 51.319]." [PSC Supplemental Br. at 3-4]. For this reason, the PSC requests that this Court either defer ruling on these issues until after the FCC redefines this standard, or remand the issues to the PSC for further consideration in light of the new standard to be promulgated by the FCC.

Although the Court is impressed by the logic of SWBT's argument, and would vacate § 51.317 pursuant to the logic of the Supreme Court's decision if it had the authority to do so, the fact remains that this Court lacks jurisdiction to vacate FCC regulations. While the Supreme Court could have vacated § 51.317 under the same reasoning it used to vacate § 51.319, it did not do so. For this reason, § 51.317 is still a valid FCC regulation that cannot be challenged in this Court. Because the PSC used § 51.317 to require SWBT to provide access to dark fiber and subloops, the Court will not reverse its decision. Nevertheless, because of the serious questions the Supreme Court's decision raises about the validity of § 51.317, the Court will accept the PSC's invitation to remand the issues of dark fiber and subloops for further consideration in light of the revised standards to be promulgated by the FCC.

E. Whether the PSC Unlawfully Failed to Provide Any Means for SWBT to Limit Its Liability to AT & T Customers and Failed to Consider This Cost in Setting Rates

SWBT's final argument is that the PSC erred by refusing to allow SWBT to limit its liability to AT & T's customers. Telephone providers typically limit their liability to their customers to the amount their customers paid for the service, except in cases of gross negligence or intentional misconduct. SWBT sought to mimic this practice in the Agreement. It proposed that AT & T and SWBT each indemnify the other for claims brought by its own customers, except in cases of gross negligence or intentional misconduct. In this way, each company could limit its liability to its own customers by contract and would not be liable for negligently inflicting injury on the other's customers. The PSC rejected this proposal, thereby eliminating SWBT's ability to limit its liability to AT & T's end users for ordinary negligence. The PSC instead accepted AT & T's proposal that "each party be

responsible for the damage it causes toward [customers]." [Report and Order of December 23, 1997, at 39, ROA 1962]. Thus, because of the PSC's order, SWBT would be fully liable to AT & T's customers for ordinary negligence, while its liability to its own customers would be limited.

SWBT argues that this ruling violated the Telecommunications Act by requiring it to provide better interconnection to AT & T than it provides to itself. 47 U.S.C. § 251(c)(2)(C) (requiring incumbent to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself."); *Iowa Utilities Bd.*, 120 F.3d at 812 (ILECs cannot be required to provide superior interconnection to CLECs). The term interconnection, however, "refers only to the physical linking of two networks for the mutual exchange of traffic." *Local Competition Order* at ¶ 176; *aff'd Competitive Telecommunications Ass'n v. F.C.C.*, 117 F.3d 1068, 1072 (8th Cir.1997). Interconnection does not encompass, for example, the transport and termination of traffic. *Local Competition Order* at ¶ 176. Hence, AT & T argues that because the PSC's allocation of legal liability has nothing to do with physical interconnection service, there is no violation of 47 U.S.C. § 251(c)(2)(C). SWBT responds that the PSC's allocation of liability does require SWBT to provide superior physical interconnection services to AT & T. It reasons that, as a practical matter, the PSC's order requires it to provide better service to AT & T to avoid the risk of negligence claims by AT & T customers. On the other hand, when serving its own customers, SWBT need not eliminate all negligence or the appearance of negligence that might subject it to expensive litigation because it can contractually limit its liability. The Court agrees with SWBT that this scheme violates the Act.[18]

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[18] This interpretation of the Act also avoids the potential "takings" argument that would be present if the government were to require an

AT & T argues that the PSC's decision is efficient, because imposing liability on SWBT creates an incentive for the incumbent to avoid negligently injuring AT & T and its customers. First, regardless of contrary policy consideration, the Court is limited by the requirements of the Act. Second, even in the absence of this arrangement, SWBT has a financial incentive to avoid negligently injuring AT & T and its customers. The Agreement renders SWBT liable to AT & T for negligent injuries it causes to AT & T. SWBT is also required by the Act to provide nondiscriminatory access to its network. 47 U.S.C. § 251(c)(3). SWBT, therefore, has a compelling incentive to provide AT & T customers with at least as good a service as it provides to its own customers. Otherwise, it is in violation of either the Act or the Agreement. Requiring SWBT to be directly liable to AT & T customers, however, would force SWBT to provide to AT & T customers a better service than it currently provides to its own customers. Because this violates the Act, the Court reverses and remands the PSC's decision on this issue.

F. Whether the PSC Violated the Telecommunications Act by Failing to Require SWBT to Purchase the Licenses Required to Allow AT & T to Use Its Network Without Violating the Intellectual Property Rights of Third Parties

AT & T also makes two objections to the PSC's rulings: (1) that the PSC should have required SWBT to provide licenses for the intellectual property used in its network; and (2) that the PSC wrongly prohibited the aggregation of toll services for resale and restricted AT & T's resale of promotional offerings of 90 days or fewer. The Court will consider these arguments in turn.

ILEC to provide a better product to its competitors' customers than it provides to its own customer, without any compensation.

First, AT & T argues that the PSC violated the Telecommunications Act when it failed to require SWBT to purchase any licenses and "right to use agreements"[19] necessary to allow AT & T to use SWBT's network without incurring liability. Much of SWBT's network uses equipment and software that is subject to third-parties' intellectual property rights. SWBT purchased licenses allowing it to use this equipment while respecting these intellectual property rights. Some of SWBT's licenses state that only SWBT may use the equipment or software. Thus, the PSC was asked to decide whether SWBT must purchase the licenses necessary to allow AT & T to use the intellectual property without incurring liability. The PSC did not require SWBT to purchase these licenses. However, it ordered SWBT to provide a list of all known licenses applicable to the relevant network elements, to use its best efforts to facilitate AT & T's attempts to obtain the necessary licenses, and to negotiate for the provision of alternate elements if a necessary license could not be obtained.

AT & T asserts that this issue of whether ILECs must purchase licenses for competitors is currently pending before the FCC, and asks the Court to defer ruling until the FCC case reaches its resolution. AT & T has not filed a formal motion for a stay, and the Court believes that it has ample information with which to evaluate whether the PSC violated the Telecommunications Act even in the absence of an applicable FCC regulation.

Turning to the merits of AT & T's challenge, the Court holds that the PSC's decision did not violate the Telecommunications Act. AT & T argues that the PSC's ruling violates the Act's requirement that incumbents provide "nondiscriminatory" access to network elements. § 251(c)(3); *Iowa Utilities Bd.*, 120 F.3d at 812 (ILECs must provide

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[19] For the remainder of this opinion, both licenses and right to use agreements will be referred to as licenses.

requesting carriers with services of equal quality to those they provide themselves); *Local Competition Order* ¶¶ 312-313 and 315 (access must be nondiscriminatory and equal to the terms and conditions under which ILEC's provide services to themselves).

AT & T argues that this requirement was violated because "the Agreement allows SWBT effectively to deny access to unbundled network elements by withholding the software and other embedded intellectual property necessary to use them." [AT & T Sugg. at 10]. Strictly speaking, however, the licenses are not necessary to enable AT & T to use SWBT's network. AT & T could use the network without obtaining the licenses, even though doing so would violate others' intellectual property rights. For this reason, the PSC concluded that Agreement does not violate the Act by denying AT & T access to SWBT's network:

> SWBT's proposed language would not make AT & T's purchase of the necessary copyrights a condition precedent to provisioning UNEs, but merely clarifies that SWBT cannot be held responsible to third parties for AT & T's copyright infringements. Also, AT & T's argument is undercut by SWBT's promise to assist AT & T in locating the applicable property rights. It is difficult to see how SWBT could successfully prevent AT & T's use of UNEs on the ground that AT & T had failed to seek necessary licenses when SWBT would itself be under an obligation to disclose any known intellectual property rights to AT & T. The Commission also finds that SWBT's proposed language merely exculpates SWBT and requires AT & T to defend, hold harmless, and indemnify SWBT for AT & T's infringement. This does not violate the Act.

[Report and Order of January 2, 1998, ROA 2000]. Thus, the PSC's ruling does not allow SWBT to refuse access to its network on the grounds that AT & T has not obtained the necessary licenses.

Nor did the PSC's ruling deny AT & T access in practical effect, because SWBT was required to assist AT & T in purchasing the relevant licenses. The requirements imposed on SWBT are more than sufficient under the standard articulated by the FCC in an analogous context:

> [P]roviding incumbent LECs may not evade their . . . obligations merely because their arrangements with third party providers of information and other types of intellectual property do not contemplate—or allow provision of certain types of information to qualifying carriers. Therefore, we decide that the providing incumbent LEC must determine an appropriate way to negotiate and implement . . . agreements with qualifying carriers, i.e., without imposing inappropriate burdens on inappropriate carriers. In cases where the only means available is including the qualifying carrier in a licensing arrangement, the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly . . . We merely require the providing incumbent LEC to do what is necessary to ensure that the qualifying carrier effectively receives the benefits to which it is entitled.

[12 FCC Rcd. 5470 (1997) at ¶ 70]. This ruling, quoted by AT & T, does not require incumbents to negotiate directly with third-parties in all cases. Rather, it requires incumbents "to do what is necessary" to allow competitors to use their networks without incurring liability. The PSC reasonably concluded that AT & T would be able to purchase the relevant licenses if SWBT provided the names of the relevant third parties and used its best efforts to help AT & T reach agreements with these parties.

AT & T also argues that the cost of obtaining the relevant licenses would have been lower if the PSC had ordered SWBT to obtain them. AT & T argues that "it is undeniable that the additional costs of any negotiations and, more

fundamentally, the disparate costs of access they will inevitably produce, violate the Act's nondiscrimination requirement." [AT & T Sugg. at 14]. AT & T first notes that SWBT was allowed to choose among competing vendors when purchasing its licenses, while AT & T will be "a captive customer of . . . SWBT's previously selected vendors." [SWBT Sugg. at 14]. Thus, AT & T reasons that it will have to pay more than SWBT paid for access to the same equipment and software. AT & T fails to acknowledge that at this time, AT & T and SWBT are both captive customers. If the PSC had ordered SWBT to purchase the relevant licenses for AT & T, then SWBT would need to purchase these intellectual property rights from the same vendors from which it purchased its original licenses. For this reason, AT & T has failed to show that the PSC increased the cost of licenses and agreements allowing AT & T to use SWBT's network by requiring a captive customer to negotiate for these rights. Nor is the Court persuaded that the fact that intellectual property rights may cost AT & T more than they cost SWBT constitutes discrimination under the Act. The Act specifically provides that rates for interconnection and unbundled network elements shall be based on the cost of providing such access. 47 U.S.C. § 252(d)(1)(A). Part of the cost of interconnection is obtaining the relevant licenses (or being subject to liability). If SWBT were required to purchase these licenses for AT & T, then it could legitimately pass these costs through to AT & T in increased rates. For this reason, it is not discriminatory that the Agreement requires AT & T to pay these higher costs directly. Either way, the cost for SWBT to provide service would be lower than the cost for AT & T.

AT & T further argues that SWBT is in a better position to determine whether amendments to its existing licensing agreements are necessary to allow AT & T to use SWBT's network without incurring liability. AT & T reasons that because contracts are construed in accordance with parties'

intent, and because SWBT is a party to its licenses, that it has better information about whether these licenses would allow AT & T to use the equipment or software at issue, or whether an amendment would be necessary. SWBT responds that "[o]nly AT & T can know the uses to which it will put a particular element as well as how that element will interact with other AT & T elements-factors essential to determine what intellectual property rights are at stake." [SWBT Opp. at 7]. The Court does not find the potential inefficiency complained about by AT & T to constitute discrimination under the Act.[20]

G. Whether the PSC Unlawfully Restricted AT & T's Resale Rights

AT & T next argues that the PSC violated the Act by restricting its resale rights under § 251(c)(4). This subsection requires ILECs such as SWBT "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." § 251(c)(4)(A). It also forbids "unreasonable or discriminatory conditions or limitations on the resale of . . . telecommunications service." § 251(c)(4)(B).

AT & T claims that the PSC violated its resale rights by barring it from aggregating toll service for resale and restricting its ability to resell promotional offerings lasting 90 days or fewer. AT & T first challenges the section of the

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[20] AT & T also argues for the first time in its reply brief that there is no evidence that the costs SWBT paid to obtain its licenses were excluded from the PSC's computation of rates. Because the other parties have not had an opportunity to respond to this argument, addressing it would require the Court to search the entire record to verify this negative assertion. Situations such as this seem to be the very reason why arguments raised for the first time in a reply brief are waived unless some reason is provided for failing to raise the argument in the opening brief. *United States v. Brown*, 108 F.3d 863, 867 (1997) (choosing not to review issue raised for the first time in a reply brief).

Agreement providing that "[t]he parties will maintain the restrictions on aggregation of toll service for resale. All other restrictions are presumed not to apply until the Parties identify and ask the Commission explicitly for imposition." [Agreement of March 4, 1998, Rec. Doc. # 16 (Appendix to Agreement 1: Resale ¶ 1.12)]. This ruling forbids AT & T from purchasing toll service that SWBT only sells to single customers and reselling the service to groups of customers. [*See* PSC Opp. to AT & T at 11]. For example, under the Agreement, AT & T cannot resell SWBT's "Plexar" service to groups of customers. Plexar service is a private telephone network for customers with multiple users, but SWBT offers Plexar service only to single customers. Thus, SWBT would presumably offer Plexar service to one corporate customer with many employees using its telephones but not to a group of several individuals who each use only one telephone. AT & T explains that aggregation "benefits customers who would not independently qualify to receive services SWBT offers only to other subscribers who satisfy certain restrictive conditions, by permitting resellers to obtain those services in their stead and resell them, free of the restrictive conditions." [AT & T Reply at 8].

Plexar and similar toll services are certainly provided "at retail to subscribers who are not telecommunications carriers," § 251(c)(4)(A), and any restriction on their resale is therefore presumptively unreasonable. *Local Competition Order* at ¶ 948 (statute "makes no exception for . . . contract and other customer-specific offerings."). However, the PSC's ruling on this issue was not a restriction on resale, because eliminating the single customer restriction would transform SWBT's toll service into a completely different service. SWBT submitted testimony to the PSC that if AT & T were allowed to offer Plexar service to multiple customers, "it could turn Plexar into a completely new quasi-local service, providing the equivalent of local service to an unlimited number of users, and bypassing SWBT's legitimate charges

for local exchange service." [SWBT Opp. at 9, citing Direct Test. of Daniel L. Jackson at 16-20 (Sept. 18, 1996)]. Applicable FCC regulations explain that ILECs have no obligation under § 251(c)(4) to sell to their competitors services that are different from the ILECs offer to their own customers:

> The principal distinction between sections 251(c)(3) and 251(c)(4), in terms of the opportunities each section presents to new entrants, is that carriers using solely unbundled elements, compared with carriers purchasing services for resale, will have greater opportunities to offer services that are different from those offered by incumbents. More specifically, carriers reselling incumbent LEC services are limited to offering the same service an incumbent offers at retail. This means that resellers cannot offer services or products that incumbents do not offer. The only means by which a reseller can distinguish the services it offers from those of an incumbent is through price, billing services, marketing efforts, and to some extent, customer service.

Local Competition Order at ¶ 332. SWBT presented sufficient testimony from which the PSC could reasonably conclude that eliminating the single customer restriction from its toll service would transform it into a different service. The PSC therefore reasonably concluded that SWBT was only required to resell toll service with the same use limitations that it imposed on its own customers. [*See* PSC Opp. to AT & T at 11 ("Resale of a specific service is customer-specific.")].

Finally, AT & T challenges a section of the Agreement stating that "promotions of 90 days or less will be available for resale at the retail rate less the established avoided cost discount (i.e., AT & T may not elect the promotional rate)." [Agreement, March 4, 1998, Rec. Doc. # 16]. The Act provides that services for resale shall be priced as follows: "a

State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." § 252(d)(3). The FCC has ruled that promotional offerings of 90 days or less must be resold, but that the promotional rate does not constitute a "retail rate" which must then be discounted to compute a wholesale rate:

> An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:
>
> (i) such promotions involve rates that will be in effect for no more than 90 days; and
>
> (ii) the incumbent LEC does not make use of such promotional offerings to evade the wholesale rate obligation, for example by making available a series of 90-day promotional rates.

47 C.F.R. § 51.613(a)(2); *see also Iowa Utils. Bd.*, 120 F.3d at 818-19 (upholding this regulation); *Local Competition Order* at ¶¶ 949-950. The FCC has not directly addressed the issue of whether requesting carriers can elect to purchase services at the promotional rate rather than the wholesale rate, however.

AT & T argues that it must be allowed to elect the promotional rate, because otherwise SWBT would be able to offer promotional rates that are lower than the wholesale rates charged to its competitors. The FCC already addressed this issue, and concluded that the potential anti-competitive effects of promotional offerings were offset by their competitive effects, especially because the promotional offerings were limited to 90 days and could not be offered consecutively. *Local Competition Order* at ¶ 950.

AT & T also argues that the language of the Act requires that it be allowed to choose the promotional rate rather than the wholesale discount. AT & T cites two cases concluding that "promotional programs . . . are telecommunications services which . . . must be made available for resale." *Iowa Utils. Bd.*, 120 F.3d at 819; *accord MCI Telecommunications Corp.*, 7 F.Supp.2d at 682-83. Neither the *MCI* case nor the Eighth Circuit's decision requires that requesting carriers be allowed to purchase short-term promotions at promotional rates. AT & T reasons, however, that a short-term promotional offering is nothing but ordinary SWBT services offered at a discount, and that if such discounts are "services" that must be resold, then AT & T must be allowed to elect the promotional rate. [*See* AT & T Reply at 15, n.13]. The *MCI* case, upon which AT & T relies, shows the flaw in this reasoning. In *MCI*, the agreement provided that "short-term promotions shall not be available for resale," in clear violation of the FCC regulations. The requesting carrier objected that "BellSouth may market new and innovative combinations as short-term promotions," which would not be available for resale to MCI. *Id.* at 682. The court agreed that MCI had "a right under the Act to purchase those combinations **at a wholesale rate**." *Id.* (emphasis added). A short-term promotional offering consists of both a particular package of services and a promotional rate. If the services are available for resale at wholesale rates, then the requirements of the Act are satisfied. *Id.* This interpretation is supported by the language of the Act and the text of the applicable FCC regulations, both of which state that services should be priced for resale by applying a wholesale discount to a retail rate. Neither the statute nor the regulations makes any reference to requesting carriers being allowed to elect to purchase services at a promotional rate instead. For this reason, the PSC's ruling about promotional rates must be affirmed.

V. *Conclusion*

Accordingly, it is hereby ORDERED that SWBT's Motion for Summary Judgment (Doc. #43) is GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED to the extent that the PSC's rulings discussed in this opinion concerning dark fiber and subloops are REMANDED so that the PSC can reconsider these issues in light of new standards to be promulgated by the FCC. It is also GRANTED to the extent that the PSC's ruling rendering SWBT liable for injuries to AT & T's customers caused by its negligence is REVERSED AND REMANDED. In all other respects, the Motion is DENIED. It is further

ORDERED that in all other respects, the PSC's rulings are AFFIRMED. It is further

ORDERED that AT & T's Motion for Summary Judgment (Doc. #45) is DENIED. It is further

ORDERED that AT & T's Motion for Leave to File Supplemental Response Brief Concerning the Supreme Court's *Iowa Utilities Board* Decision (Doc. #79) is GRANTED. It is further

ORDERED that BroadSpan Communications's Motion to Withdraw Application to Intervene and [to Withdraw] Motion for Protective Transition Measures (Doc. #82) is GRANTED. The Application to Intervene (Doc. #31) and Motion for Protective Transition Measures (Doc. #33) are WITHDRAWN. It is further

ORDERED that the Motion to Intervene by the United States of America (Doc. #92) is GRANTED. The United States has already filed its brief in response to the Court's order of August 12, 1999.

APPENDIX C

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

Case No. TO-98-115

At a session of the Public Service Commission held at its office in Jefferson City on the 19th day of March, 1998.

IN THE MATTER OF AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.'S PETITION FOR SECOND COMPULSORY ARBITRATION PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996 TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE COMPANY.

ORDER APPROVING AGREEMENT FILED IN COMPLIANCE WITH COMMISSION ORDER

On December 23, 1997, the Commission entered its Report and Order, resolving the issues presented by the parties for arbitration. This case was established for the purpose of addressing the issues that were not previously arbitrated in Case No. TO-97-40. The Commission's December 23 Report and Order specified language to be used by Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest (AT&T) to resolve the interconnection issues remaining between them, ordered SWBT and AT&T to submit an interconnection agreement implementing this language and the language which they had previously agreed to by February 1, 1998, and set interim rates for certain services to be provided to AT&T by SWBT. The Report and Order also determined a procedure for the establishment of permanent rates.

On December 29, 1997, SWBT filed its objections to the process for establishing permanent rates, and on

December 31, SWBT filed an Application for Rehearing of the Commission's December 23 Report and Order. SWBT's objections and application for rehearing are under consideration and will be addressed by the Commission by separate order or orders.

AT&T filed a motion on January 27, requesting an extension of time for approximately one month to comply with Ordered Paragraph 3 of the Commission's December 23 Report and Order. According to AT&T, despite diligent efforts on the part of SWBT and AT&T, the parties had not been able to devote sufficient resources to comply with the Commission's February 1 filing deadline because their subject matter experts had obligations to meet in other state arbitration proceedings. No party opposed AT&T's motion.

On March 4, SWBT and AT&T filed an interconnection agreement that had been executed by the parties on February 27 (Agreement) to implement the Report and Order. Pursuant to Ordered Paragraph 3 of the Commission's December 23 Report and Order, the Agreement is supposed to include: 1) all language implementing the terms agreed to by the parties and not submitted for arbitration, and 2) all language that the Commission ordered the parties to include to resolve the issues submitted for arbitration. The Commission reserved its ruling on any terms that were not arbitrated until the complete agreement was filed so that it could review the agreement in its entirety for compliance with the federal Telecommunications Act of 1996 (the Act), 47 U.S.C. § 151 *et seq.* The Commission directed Staff to file a Memorandum recommending approval or rejection of the Agreement.

Staff filed a Memorandum on March 17, recommending approval of the Agreement. Staff stated that the agreement will take effect upon Commission approval and will expire after a three-year initial term. The agreement may be extended twice for one-year periods unless written notice is given. The Agreement covers terms for the resale of all

services except operator services at a 19.2 percent discount from SWBT's retail prices. Operator services are to be discounted 13.9 percent from SWBT's wholesale prices. Some of the prices established for unbundled network elements (UNEs) are the rates that the Commission ordered in Case No. TO-97-40. The Agreement provides for the remaining prices, established on an interim basis in the Commission's December 23 Report and Order in this case, to be reviewed by the Arbitration Advisory Staff, with a true-up to follow the establishment of permanent rates by the Commission.

The Agreement also specifies terms for network interconnection architecture and compensation, collocation, rights-of-way, conduits, pole attachments, interim number portability, 911/E911, network security and law enforcement, failures to meet performance criteria, exchange of directory listing information, white pages, clearinghouse, numbering, facilities-based directory assistance and facilities-based operator services.

The Commission finds that AT&T's motion for additional time to file a signed interconnection agreement should be granted. The Commission further finds that the Agreement filed with the Commission on March 4 should be approved. The standard for deciding arbitration cases was set forth in the Commission's December 23 Report and Order, and the Commission previously determined that the arbitrated portions of the agreement meet those standards. Staff stated in its Memorandum that there were instances where the parties did not implement the exact determination set forth in the Commission's prior arbitration orders in this case and in Case No. TO-97-40, but in each of those instances the parties had reached agreement and included language in the Agreement to implement their modifications.

When parties submit a voluntary agreement to a state commission for approval, the agreement may only be

approved if it 1) does not discriminate against telecommunications carriers not a party to the agreement and 2) is not against the public interest. *See* § 252(e) (2) (A) of the Act. The Commission has reviewed the Agreement between SWBT and AT&T, and the Staff's recommendation, and determined that the Agreement complies with the Act.

IT IS THEREFORE ORDERED:

1. That the interconnection agreement filed by Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. pursuant to the Commission's Report and Order of December 23, 1997, is approved.

2. That this order shall become effective on March 30, 1998.

BY THE COMMISSION

/s/ Dale Hardy Roberts
DALE HARDY ROBERTS
Secretary/Chief Regulatory Law Judge

(SEAL)

Lumpe, Ch., Drainer and
Murray, CC., concur.
Crumpton, C., dissents.

Randles, Regulatory Law Judge

APPENDIX D

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

[logo]

Case No. TO-97-40

IN THE MATTER OF AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996 TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE COMPANY.

Case No. TO-97-67

IN THE MATTER OF THE PETITION OF MCI TELECOMMUNICATIONS CORPORATION AND ITS AFFILIATES, INCLUDING MCIMETRO ACCESS TRANSMISSION SERVICES, INC., FOR ARBITRATION AND MEDIATION UNDER THE FEDERAL TELECOMMUNICATIONS ACT OF 1996 OF UNRESOLVED INTERCONNECTION ISSUES WITH SOUTHWESTERN BELL TELEPHONE COMPANY.

FINAL ARBITRATION ORDER

Issue Date: July 31, 1997

Effective Date: August 20, 1997

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held at its office in Jefferson City on the 31st day of July, 1997.

Case No. TO-97-40

IN THE MATTER OF AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.'S PETITION FOR ARBITRATION PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996 TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE COMPANY.

Case No. TO-97-67

IN THE MATTER OF THE PETITION OF MCI TELECOMMUNICATIONS CORPORATION AND ITS AFFILIATES, INCLUDING MCIMETRO ACCESS TRANSMISSION SERVICES, INC., FOR ARBITRATION AND MEDIATION UNDER THE FEDERAL TELECOMMUNICATIONS ACT OF 1996 OF UNRESOLVED INTERCONNECTION ISSUES WITH SOUTHWESTERN BELL TELEPHONE COMPANY.

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Attachment C: Costing and Pricing Report

FINAL ARBITRATION ORDER

I. Procedural History

On December 11, 1996, the Commission issued its Arbitration Order in this case. Within that order the Commission established the basis upon which prices and discounts would be established. In response to that order, numerous motions were filed requesting various forms of relief, rehearing, reconsideration or clarification.

On January 22, 1997, the Commission issued its Order Granting Clarification And Modification And Denying Motion To Identify And Motions For Rehearing. This order modified approximately eight items from the Arbitration Order and, inasmuch as the Commission's Arbitration Order identified the rates as interim, this order set a schedule for the development of permanent rates. That schedule established a complex list of weekly tasks for the Commission's Arbitration Advisory Staff to undertake beginning February 10 with a targeted concluding date of June 30 for the issuance of permanent rates.

The complexity of the issues which were being reviewed by the Arbitration Advisory Staff and the depth of information which was available on each issue compelled the Commission to extend its own deadline in order to ensure a complete and thorough review of all cost, pricing and rate issues. As a result, on June 9 the Commission issued a Notice Regarding Schedule For Development Of Permanent Rates. At that time the Commission reiterated its original intent to announce proposed permanent rates and to allow the parties 30 days in which to respond to those proposed rates.

The Commission finds it appropriate to establish permanent rates at this time so that this matter may be resolved in such a way as to maximize the opportunities for these parties to move Missouri toward local competition. Rather than delay this matter by an additional 30 days for comment,

the Commission will make this its final order. However, in the interests of due process, the Commission will allow the parties twenty days to move for reconsideration or clarification.

The process of reviewing the costs, discounts and proposed rates was designed so that Southwestern Bell Telephone Company (SWBT), AT&T Communications of the Southwest, Inc. (AT&T) and MCI Telecommunications Corporation (MCI) could designate the appropriate subject matter expert (SME) or provide documentation in support of its position. As a result, the process led to a remarkable level of open communication and cooperation between SWBT, AT&T, MCI and the Arbitration Advisors. The work which has resulted from this effort consumes several hundred pages and constitutes a thorough and exhaustive review of each and every cost factor which the Commission finds relevant to this arbitration. This "Costing and Pricing Report" is Attachment C. A similar document containing highly confidential information has been filed and provided to the parties pursuant to the Commission's procedures set out in its Protective Order.

II. Discussion and Findings

The Commission finds that the discount rate for resold services should be reduced from 20.32 percent to 19.2 percent for all services except operator services and 13.91 percent for operator services only. In light of the extensive review and analysis by the Commission's Advisory Staff (*see* Attachment C), the Commission finds that a 19.2 percent discount rate for all services except operator services and a 13.91 percent for operator services only results in just and reasonable rates for resold basic local telecommunications services. The parties shall prepare an interconnection agreement that incorporates the rates selected in Attachment A to this Final Arbitration Order which is entitled "Resale Study for SWBT."

The Commission finds that, in light of the extensive review and analysis by the Commission's Advisory Staff (*see* Attachment C), certain modifications should be made to the interim rates previously ordered for unbundled network elements (UNEs). The Commission finds that the permanent rates for UNEs, included with this Final Arbitration Order as Attachment B entitled "Permanent Prices for Unbundled Network Elements," result in just and reasonable rates. The parties shall prepare an interconnection agreement that incorporates the rates in Attachment B.

Prices for the unbundled network elements include the full functionality of each element. No additional charges for any such element, the functionalities of the element, or the activation of the element or its functionalities shall be permitted.

The Commission will direct the parties to complete interconnection agreements in full conformance with the attached document in 60 days.

The Commission finds that the attachments to this order constitute a final reconciliation of all pending issues from the original Arbitration Order as issued on December 11, 1996. The original Arbitration Order shall remain effective to the extent that it is not inconsistent with this order.

In this regard, the Commission rejects all proposed interconnection agreements previously tendered by any party. It also denies SWBT's motion to strike, AT&T's motion to establish a procedural schedule and OPC's motion agreeing to AT&T's as moot.

IT IS THEREFORE ORDERED:

1. That the issues set out by the parties shall be resolved consistent with this order and the attachments hereto. Southwestern Bell Telephone Company, AT&T Communications of the Southwest, Inc. and MCI Telecommunications

Corporation shall negotiate a final interconnection agreement for submission to the Missouri Public Service Commission consistent with this order.

2. That the rate schedules attached to this Final Arbitration Order as Attachments A and B shall be the approved permanent rates for all the elements and services listed therein.

3. That the parties shall have until August 20, 1997 to move for reconsideration or clarification.

4. That the parties shall prepare and submit to the Commission for approval an interconnection agreement reflecting the findings embodied in this order and the permanent rates embodied in Attachments A and B.

5. That the agreement described in Ordered Paragraph 4 shall be submitted to the Commission no later than September 30, 1997.

6. That the parties shall comply with the Commission's findings on each and every issue.

7. That the Arbitration Order issued in this case on December 11, 1996 shall remain effective to the extent that it is not inconsistent with this order.

8. That any proposed interconnection agreements filed herein are rejected and all pending motions which have not been previously addressed are hereby denied.

9. That this Final Arbitration Order shall become effective on August 20, 1997.

(SEAL) BY THE COMMISSION

/s/ Cecil I. Wright
CECIL I. WRIGHT
Executive Secretary

Crumpton, Drainer, Murray
and Lumpe, CC., concur.
Zobrist, Chm., concurs,
with concurring opinion to follow.

CASE NO. TO-97-40

and

CASE NO. TO-97-67

Final Arbitration Order

ATTACHMENT A

Calculation Detail by Account of Development of Wholesale Discount-All Services Except Operator Services

RESALE STUDY FOR SWBT
Avoided Cost Study, 1996 ARMIS Data

	Costs:	Total Missouri Regulated	% Avoided	SWBT Avoided
	Direct:	($000)		($000)
6611	Product Management	7206	50%	3603
6612	Sales	22214	90%	19993
6613	Product Advertising	11022	90%	9920
6621	Call Completion services	11181	100%	11181
6622	Number Services	34145	100%	34145
6623	Customer Services	95206	90%	85685
	Indirect:			
5301	Uncollectible Revenue	16669	15.67%	2612
6112	Motor Vehicle Exp.	826	0.00%	0
6113	Aircraft Exp.	0	0.00%	0
6114	Spec Purpose Vehicle	0	0.00%	0
6115	Garage Work Equipment	14	0.00%	0
6116	Other Work Equipment	141	0.00%	0
6121	Land & Buld Exp.	-9877	15.67%	-1548
6122	Furniture & Artwork	-219	15.67%	-34
6123	Office Exp.	2552	15.67%	400
6124	Gen Purpose Computers	-23693	15.67%	-3713
6211	Analog Electronic Exp.	15021	0.00%	0
6212	Digital Electronic Exp.	42980	0.00%	0
6215	Electro-mech Exp.	93	0.00%	0
6220	Operators Exp.	300	0.00%	0
6231	Radio System Exp.	358	0.00%	0

	Costs: Indirect:	Total Missouri Regulated	% Avoided	SWBT Avoided
6232	Circuit System Exp.	19641	0.00%	0
6311	Station Apparatus Exp.	1	0.00%	0
6341	Lg PBX/Exp.	201	0.00%	0
6351	Pubic Tel Term Eq Exp.	4163	0.00%	0
6362	Other Terminal Eq Exp.	20051	0.00%	0
6411	Poles Exp.	1684	0.00%	0
6421	Aerial Cable Exp.	47185	0.00%	0
6422	Underground Cable Exp.	6641	0.00%	0
6423	Buried Cable Exp.	66906	0.00%	0
6424	Submanne Cable Exp.	0	0.00%	0
6425	Deep Sea Cable Exp.	0	0.00%	0
6426	Intrabuilding Network Cable	36	0.00%	0
6431	Aerial Wire Exp.	27	0.00%	0
6441	Conduit Systems Exp.	806	0.00%	0
6511	Telecomm Use Exp.	0	0.00%	0
6512	Provisioning Exp.	28	0.00%	0
6531	Power Exp.	4598	0.00%	0
6532	Network Admin Exp.	13298	0.00%	0
6533	Testing Exp.	38402	0.00%	0
6534	Plant Operations Admin	29487	0.00%	0
6535	Engineering Exp.	17813	0.00%	0
6540	Access Exp.	53296	0.00%	0
6561	Depreciation Telecom Plan	347816	0.00%	0
6562	Depreciation Future Telecom	0	0.00%	0
6563	Amortization Exp. - Tangi	683	0.00%	0
6564	Amortization Exp. - Intang	0	0.00%	0
6565	Amortization Exp. - Other	5298	0.00%	0
6711	Executive	5562	15.67%	872
6712	Planning	1727	15.67%	271
6721	Accounting & Finance	12106	15.67%	1898
6722	External Relations	19542	15.67%	3063
6723	Human Resources	16480	15.67%	2583
6724	Information Management	43707	15.67%	6851
6725	Legal	5192	15.67%	814
6726	Procurement	3682	15.67%	577
6727	Research and Development	5739	15.67%	900
6728	Other Gen & Admin	31882	15.67%	4997
	Total	$868,667		$185,069

Revenues:		% Included:	Included:
Local Service	807299	100%	807299
Toll Network Service	156649	100%	156649
Network Access Service	444248	0%	0
Miscellaneous	172704	0%	0
Total	$1,580,900		$963,948

Resale Percentage Discount on Revenue:

% of Resold Services Revenue	19.20%
(Local & Toll Network Service)	

Calculation Detail by Account of Development of Wholesale Discount—Operator Services Only

RESALE STUDY for SWBT

Avoided Cost Study, 1996 ARMIS Data

	Costs:	Total Missouri Regulated	% Avoided	SWBT Avoided
	Direct:	($000)		($000)
6611	Product Management	7206	50%	3603
6612	Sales	22214	90%	19993
6613	Product Advertising	11022	90%	9920
6621	Call Completion services	11181	0%	0
6622	Number Services	34145	0%	0
6623	Customer Services	95206	90%	85685
	Indirect:			
5301	Uncollectible Revenue	16669	11.35%	1893
6112	Motor Vehicle Exp.	826	0.00%	0
6113	Aircraft Exp.	0	0.00%	0
6114	Spec Purpose Vehicle	0	0.00%	0
6115	Garage Work Equipment	14	0.00%	0
6116	Other Work Equipment	141	0.00%	0
6121	Land & Buld Exp.	-9877	11.35%	-1121
6122	Furniture & Artwork	-219	11.35%	-25
6123	Office Exp.	2552	11.35%	290
6124	Gen Purpose Computers	-23693	11.35%	-2690
6211	Analog Electronic Exp.	15021	0.00%	0
6212	Digital Electronic Exp.	42980	0.00%	0
6215	Electro-mech Exp.	93	0.00%	0
6220	Operators Exp.	300	0.00%	0
6231	Radio System Exp.	358	0.00%	0
6232	Circuit System Exp.	19641	0.00%	0
6311	Station Apparatus Exp.	1	0.00%	0
6341	Lg PBX/Exp.	201	0.00%	0
6351	Pubic Tel Term Eq Exp.	4163	0.00%	0
6362	Other Terminal Eq Exp.	20051	0.00%	0
6411	Poles Exp.	1684	0.00%	0
6421	Aerial Cable Exp.	47185	0.00%	0
6422	Underground Cable Exp.	6641	0.00%	0

Costs: Indirect:		Total Missouri Regulated ($000)	% Avoided	SWBT Avoided ($000)
6423	Buried Cable Exp.	66906	0.00%	0
6424	Submarine Cable Exp.	0	0.00%	0
6425	Deep Sea Cable Exp.	0	0.00%	0
6426	Intrabuilding Network Cable	36	0.00%	0
6431	Aerial Wire Exp.	27	0.00%	0
6441	Conduit Systems Exp.	806	0.00%	0
6511	Telecomm Use Exp.	0	0.00%	0
6512	Provisioning Exp.	28	0.00%	0
6531	Power Exp.	4598	0.00%	0
6532	Network Admin Exp.	13298	0.00%	0
6533	Testing Exp.	38402	0.00%	0
6534	Plant Operations Admin	29487	0.00%	0
6535	Engineering Exp.	17813	0.00%	0
6540	Access Exp.	53296	0.00%	0
6561	Depreciation Telecom plan	347816	0.00%	0
6562	Depreciation Future Telecom	0	0.00%	0
6563	Amortization Exp. - Tangi	683	0.00%	0
6564	Amortization Exp. - Intang	0	0.00%	0
6565	Amortization Exp. - Other	5298	0.00%	0
6711	Executive	5562	11.35%	632
6712	Planning	1727	11.35%	196
6721	Accounting & Finance	12106	11.35%	1375
6722	External Relations	19542	11.35%	2219
6723	Human Resources	16480	11.35%	1871
6724	Information Management	43707	11.35%	4963
6725	Legal	5192	11.35%	590
6726	Procurement	3682	11.35%	418
6727	Research and Development	5739	11.35%	652
6728	Other Gen & Admin	31882	11.35%	3620
	Total	$868,847		$134,081
	Revenues:		% Included:	Included:
	Local Service	807299	100%	807299
	Toll Network Service	156649	100%	156649
	Network Access Service	444248	0%	0
	Miscellaneous	172704	0%	0
	Total	$1,580,900		$963,948

Resale Percentage Discount on Revenue:

% of Resold Services Revenue (Local & Toll Network Service)	13.91%

CASE NO. TO-97-40

and

CASE NO. TO-97-67

Final Arbitration Order

ATTACHMENT B

Permanent Prices for Unbundled Network Elements

Rate Zone *	Tariffed Rate Group	Staff Proposed Price	NRCs First	NRCs Additional
Unbundled Loops				
2-Wire 8db Loop				
Zone 1	Group D	$12.71		
Zone 2	Group B	$20.71		
Zone 3	Group A	$33.29		
Zone 4	Group C	$18.23		
	Statewide		$26.07	$11.09
4-Wire 8db Loop				
Zone 1	Group D	$19.79		
Zone 2	Group B	$35.35		
Zone 3	Group A	$61.16		
Zone 4	Group C	$30.08		
	Statewide		$28.77	$11.09
ISDN-BRI Loop				
Zone 1	Group D	$25.79		
Zone 2	Group B	$42.10		
Zone 3	Group A	$58.44		
Zone 4	Group C	$41.44		
	Statewide		$57.77	$30.22
ISDN-PRI Loop				
Zone 1	Group D	$101.18		
Zone 2	Group B	$106.06		
Zone 3	Group A	$107.89		
Zone 4	Group C	$101.39		
	Statewide		$136.63	$53.94

Rate Zone *	Tariffed Rate Group	Staff Proposed Price	NRCs First	NRCs Additional
DS 1 Digital Loop				
Zone 1	Group D	$101.18		
Zone 2	Group B	$106.06		
Zone 3	Group A	$107.89		
Zone 4	Group C	$101.39		
	Statewide		$136.63	$53.94
DS Loop Loss Conditioning		$6.63	$22.76	$8.58
Cross Connects				
Cross-Connects with Test Equipment Same Central Office				
2-Wire Analog		$1.89	$35.83	$29.44
4-Wire Analog		$3.77	$41.63	$35.73
2-Wire Digital ISDN-BRI		$1.89	$35.83	$29.44
4-Wire Digital DS-1/ISDN-PRI		$9.00	$60.04	$41.06
Cross-Connects without Test Equipment Same Central Office				
2-Wire Analog		$0.31	$19.96	$12.96
4-Wire Analog		$0.63	$25.38	$17.73
2-Wire Digital ISDN-BRI		$0.31	$19.96	$12.69
4-Wire Digital DS-1/ISDN-PRI		$0.00	$34.48	$28.57
Cross-Connects to Different CO or SWBT Multiplexor				
2-Wire Analog		$4.03	$52.24	$45.85
4-Wire Analog		$5.19	$60.47	$54.57
2-Wire Digital ISDN-BRI		$6.31	$52.24	$45.85

* Staff proposed 4 rate zones corresponding to SWBT's tariffed rate groups while the Interim and SWBT proposed 3 rate zones by combining tariffed rate zones C and D into one zone.

Permanent Prices for Unbundled Network Elements

Rate Zone *	Tariffed Rate Group	Staff Proposed Price	NRCs First	NRCs Additional
Local Switching Port Charges				
2-Wire Analog Line-Side Port				
Zone 1	Group D	$1.74		
Zone 2	Group B	$1.97		
Zone 3	Group A	$2.47		
Zone 4	Group C	$2.25		
	Statewide		$39.37	$35.27
ISDN-BRI Port				
Zone 1	Group D	$5.56		
Zone 2	Group B	$5.56		
Zone 3	Group A	$5.56		
Zone 4	Group C	$5.56		
	Statewide		$6.47	$3.53
ISDN-PRI Port				
Zone 1	Group D	$165.85		
Zone 2	Group B	$165.85		
Zone 3	Group A	$165.85		
Zone 4	Group C	$165.85		
	Statewide		$214.53	$98.53
DS-1 Trunk Port				
Zone 1	Group D	$132.14	$162.38	$24.76
Zone 2	Group B	$126.71	$162.44	$24.83
Zone 3	Group A	$58.04	$160.47	$22.86
Zone 4	Group C	$140.35	$164.98	$27.36
2-Wire Analog Trunk Port (DID)				
Zone 1	Group D	$13.55	$64.00	
Zone 2	Group B	$14.45	$69.47	
Zone 3	Group A	$10.60	$59.76	
Zone 4	Group C	$15.12	$62.01	
Usage-per Minute of Use				
Zone 1	Group D	$0.001988		
Zone 2	Group B	$0.002391		
Zone 3	Group A	$0.003444		
Zone 4	Group C	$0.002934		
	Statewide		na	

* Staff proposed 4 rate zones corresponding to SWBT's tariffed rate groups while the Interim and SWBT proposed 3 rate zones by combining tariffed rate zones C and D into one zone.

Permanent Prices for Unbundled Network Elements

Rate Zone *	Tariffed Rate Group	Staff Proposed Price	NRCs First	NRCs Additional
Dedicated Interoffice Transport				
DS 1 Dedicated Transport I/O				
First Mile, per month				
Zone 1	Group D	$57.49	$184.84	$118.14
Zone 2	Group B	$86.96	$184.84	$118.14
Zone 3	Group A	$82.07	$184.84	$118.14
Zone 4	Group C	$48.70	$187.84	$118.14
InterZone		$100.36	$184.84	$118.14
DS 1 Dedicated Transport I/O				
Additional Mile, per month				
Zone 1	Group D	$0.62	$184.84	$118.14
Zone 2	Group B	$1.67	$184.84	$118.14
Zone 3	Group A	$1.60	$184.84	$118.14
Zone 4	Group C	$0.19	$184.84	$118.14
InterZone		$0.97	$184.84	$118.14
DS 3 Dedicated Transport I/O				
First Mile, per month				
Zone 1	Group D	$925.21	$203.10	$135.06
Zone 2	Group B	$1,824.14	$203.10	$135.06
Zone 3	Group A	$2,052.06	$203.10	$135.06
Zone 4	Group C	$789.13	$203.10	$135.06
InterZone		$2,361.66	$203.10	$135.06
DS 3 Dedicated Transport I/O				
Additional Mile, per month				
Zone 1	Group D	$15.64	$203.10	$135.06
Zone 2	Group B	$56.45	$203.10	$135.06
Zone 3	Group A	$97.60	$203.10	$135.06
Zone 4	Group C	$17.32	$203.10	$135.06
InterZone		$25.87	$203.10	$135.06
Transport Cross-Connects				
DS 3		$30.08	$54.98	$42.90

* Staff proposed 4 rate zones corresponding to SWBT's tariffed rate groups while the Interim and SWBT proposed 3 rate zones by combining tariffed rate zones C and D into one zone.

** The rate for an entrance facility should only apply when this element is actually utilized

Permanent Prices for Unbundled Network Elements

	Staff Proposed Price	NRCs First	NRCs Additional
Tandem Switching			
per Minute of Use	$0.00151	na	na
Signaling and Call Related Databases			
Signal Transfer Point (STP) Port	$480.61	$217.14 *	
SS7 Transport	$0.0000007	na	na
Toll Free Calling Database Query			
Simple	$0.000254	na	na
Complex	$0.000288	na	na
Calling Name Delivery Query	$0.000304	na	na
Line information Database Query	$0.000449	$108.55	
Dark Fiber			
Fiber Termination			
Statewide	$4.50	$42.52	$28.41
Fiber, per strand, per mile			
Zone 1 Group D	$0.002085		
Zone 2 Group B	$0.003156		
Zone 3 Group A	$0.004752		
Zone 4 Group C	$0.002085		
Unbundled Common Transport			
Facility Cost per Minute, per Mile			
Zone 1 -Group D	$0.000002	na	na
Zone 2 -Group B	$0.000007		
Zone 3 -Group A	$0.000015		
Zone 4 -Group C	$0.000001		
InterZone	$0.000003		
Termination Cost Per Minute of Use			
Zone 1 -Group D	$0.000190	na	na
Zone 2 -Group B	$0.000285		
Zone 3 -Group A	$0.000302		
Zone 4 -Group C	$0.000162		
InterZone	$0.000332		

	Staff Proposed Price	NRCs First	NRCs Additional
Directory Assistance and Operator Services			
Directory Assistance	1	na	na
Directory Assistance Call Completion	1		
Directory Assistance Listing	1		
Local Operator Assistance	1		
IntraLATA Operator Assistance	1		
Operator Work Seconds	1		

[1] Lowest Existing Intercompany Compensation Arrangement

* Includes NRC for STP port termination, signaling point code, and global title translation.

Permanent Prices for Unbundled Network Elements

Service Charge	$5.00
CLEC Conversion	No Additional Charge Other than Service Order

Permanent Prices for Unbundled Network Elements

Rate Zone *	Tariffed Rate Group	Staff Proposed Price	NRCs First	NRCs Additional
Subloop Unbundling **				
8dB Feeder				
Zone 1	Group D	$4.81		
Zone 2	Group B	$6.60		
Zone 3	Group A	$6.87		
Zone 4	Group C	$9.90		
	Statewide		$22.88	$10.55
BRI Feeder				
Zone 1	Group D	$20.18		
Zone 2	Group B	$32.17		
Zone 3	Group A	$30.89		
Zone 4	Group C	$39.13		
	Statewide		$54.02	$27.26
DS1 Feeder				
Zone 1	Group D	$67.05		
Zone 2	Group B	$67.27		
Zone 3	Group A	$67.17		
Zone 4	Group C	$70.79		
	Statewide		$88.78	$39.97
8dB Distribution				
Zone 1	Group D	$6.69		
Zone 2	Group B	$10.68		
Zone 3	Group A	$12.92		
Zone 4	Group C	$22.78		
	Statewide		$113.44	$47.28
BRI Distribution				
Zone 1	Group D	$9.63		
Zone 2	Group B	$13.63		
Zone 3	Group A	$15.86		
Zone 4	Group C	$25.70		
	Statewide		$115.68	$51.43

Permanent Prices for Unbundled Network Elements

Rate Zone *	Tariffed Rate Group	Staff Proposed Price	NRCs First	NRCs Additional
DS1 Distribution				
Zone 1	Group D	$4.68		
Zone 2	Group B	$6.23		
Zone 3	Group A	$10.05		
Zone 4	Group C	$22.41		
	Statewide		$175.77	$69.44

* Staff proposed 4 rate zones corresponding to SWBT's tariffed rate groups while the Interim and SWBT proposed 3 rate zones by combining tariffed rates zones C and D into one zone.

** The cost of concentration is included in both the feeder and distribution segments.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3833WMKC

SOUTHWESTERN BELL TELEPHONE COMPANY,
Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION *et al.*,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri

The appellees' request for stay of mandate pending decision of the United States Supreme Court in Iowa Utilities II, is granted.

The petitions for rehearing by the panel are denied.

February 7, 2001

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

47 U.S.C. § 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers

of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether—

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number

The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on October 26, 1999.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State

commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that—

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

(June 19, 1934, c. 652, Title II, § 251, as added Feb. 8, 1996, Pub.L. 104-104, Title I, § 101(a), 110 Stat. 61; Oct. 26, 1999, Pub.L. 106-81, § 3(a), 113 Stat. 1287.)

47 U.S.C. § 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning—

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed—

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that—

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State

commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission—

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

(June 19, 1934, c. 652, Title II, § 252, as added Feb. 8, 1996, Pub.L. 104-104, Title I, § 101(a), 110 Stat. 66.)

47 C.F.R. § 51.505 Forward-looking economic cost.

(a) *In general.* The forward-looking economic cost of an element equals the sum of:

(1) The total element long-run incremental cost of the element, as described in paragraph (b); and

(2) A reasonable allocation of forward-looking common costs, as described in paragraph (c).

(b) *Total element long-run incremental cost.* The total element long-run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.

(1) *Efficient network configuration.* The total element long-run incremental cost of an element should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers.

(2) *Forward-looking cost of capital.* The forward-looking cost of capital shall be used in calculating the total element long-run incremental cost of an element.

(3) *Depreciation rates.* The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.

(c) *Reasonable allocation of forward-looking common costs*—(1) *Forward-looking common costs.* Forward-looking common costs are economic costs efficiently incurred in providing a group of elements or services (which may include all elements or services provided by the incumbent LEC) that cannot be attributed directly to individual elements or services.

(2) *Reasonable allocation.* (i) The sum of a reasonable allocation of forward-looking common costs and the total element long-run incremental cost of an element shall not exceed the stand-alone costs associated with the element. In this context, stand-alone costs are the total forward-looking costs, including corporate costs, that would be incurred to produce a given element if that element were provided by an efficient firm that produced nothing but the given element.

(ii) The sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered.

(d) *Factors that may not be considered.* The following factors shall not be considered in a calculation of the forward-looking economic cost of an element:

(1) *Embedded costs.* Embedded costs are the costs that the incumbent LEC incurred in the past and that are recorded in the incumbent LEC's books of accounts;

(2) *Retail costs.* Retail costs include the costs of marketing, billing, collection, and other costs associated with offering retail telecommunications services to subscribers who are not telecommunications carriers, described in § 51.609;

(3) *Opportunity costs.* Opportunity costs include the revenues that the incumbent LEC would have received for the sale of telecommunications services, in the absence of competition from telecommunications carriers that purchase elements; and

(4) *Revenues to subsidize other services.* Revenues to subsidize other services include revenues associated with elements or telecommunications service offerings other than the element for which a rate is being established.

(e) *Cost study requirements.* An incumbent LEC must prove to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, using a cost study that complies with the methodology set forth in this section and § 51.511.

(1) A state commission may set a rate outside the proxy ranges or above the proxy ceilings described in § 51.513 only if that commission has given full and fair effect to the economic cost based pricing methodology described in this section and § 51.511 in a state proceeding that meets the requirements of paragraph (e)(2) of this section.

(2) Any state proceeding conducted pursuant to this section shall provide notice and an opportunity for comment to affected parties and shall result in the creation of a written factual record that is sufficient for purposes of review. The record of any state proceeding in which a state commission considers a cost study for purposes of establishing rates under this section shall include any such cost study.